


Before the
UNITED STATES COPYRIGHT ROYALTY BOARD

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Washington, D.C.

 ORIGINAL

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In Re: : Docket No.
: 15-CRB-0001-WR
Determination of Royalty : (2016-2020)
Rates and Terms for : Volume 21-PUBLIC
Ephemeral Recording and : Pages 5642-5873
Digital Performance of : Pages 5885-5896
Sound Recordings (Web IV) : Pages 5917-5949
-----:

PUBLIC SESSION

Washington, D.C.

Tuesday, May 26, 2015

The hearing in the above-entitled matter
was convened at 9:07 a.m.

BEFORE COPYRIGHT ROYALTY JUDGES:

SUZANNE M. BARNETT, CHIEF JUDGE

DAVID R. STRICKLER, JUDGE

JESSE FEDER, JUDGE

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1 C O N T E N T S

2 EXAMINATION OF DIR CROSS RED REC
MICHAEL L. KATZ, PH.D

3 BY MR. JOSEPH 5646 5790
4 BY MR. POMERANTZ 5731

5

6 EXAMINATION OF
JOHN DIMICK

7 BY MR. STURM 5792 5875
8 BY MR. OLASA 5839

9

10 EXAMINATION OF
DAVID BLACKBURN

11 BY MR. CHOUDHURY 5885
12 BY MR. MARKS 5926

13

14 EXHIBITS ADMITTED IN EVIDENCE

15 SoundExchange
Exhibit 283 NAB Rates and Terms 5741
16 Exhibit 24 Written Rebuttal Testimony 5890
of David Blackburn
17 Exhibit 1579 Digital Sales Platform 5860
Exhibit 1605 Broadcast Registration 5872
18 Exhibit 24 Written Rebuttal Testimony 5890
of David Blackburn

19

20

21 NAB
Exhibit 4000 Written Direct Testimony of 5647
Michael L. Katz, Ph.D.
(Readmitted)
22 Exhibit 4009 Written Rebuttal Testimony 5797
of John Dimick
23 Exhibit 4002 Written Direct Testimony 5809
of John Dimick
24 Exhibits
25 4102-4109 Documents with Written 5809
Written Testimony of John Dimick

1 P R O C E E D I N G S

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3 (PUBLIC SESSION)

4

5 CHIEF JUDGE BARNETT: Good morning.

6 Please be seated.

7 I'm sure I cleared my desk off on

8 Friday. What is this? Binders.

9 Professor Katz, you remain under oath.

10 Mr. Joseph.

11 MR. JOSEPH: Thank you, Your Honor.

12 NAB calls Professor Michael Katz on his direct

13 testimony.

14 MICHAEL L. KATZ, Ph.D.,

15 having been previously duly sworn, to tell the

16 truth, the whole truth and nothing but the truth,

17 testified as follows:

18 DIRECT EXAMINATION BY COUNSEL FOR NAB

19 BY MR. JOSEPH:

20 Q. Good morning, Professor Katz.

21 A. Good morning.

22 Q. Would you please turn to the tab in

23 your direct examination binder marked NAB 4000 to

24 confirm that that is your written direct testimony

25 which I believe is already in evidence.

1 A. It is.

2 MR. JOSEPH: Your Honors, I believe it
3 was admitted subject to -- without prejudice to
4 possible objections. I have been informed by
5 counsel for SoundExchange that there are none, but
6 I wanted to raise that just in case there were, so
7 now it is fully in evidence.

8 MR. POMERANTZ: No objections, Your
9 Honor.

10 CHIEF JUDGE BARNETT: 4000 to the
11 extent it was in doubt, is now fully in evidence.

12 (NAB Exhibit 4000 was readmitted into
13 evidence.)

14 MR. JOSEPH: Thank you, Your Honor.

15 BY MR. JOSEPH:

16 Q. Professor Katz, in your written direct
17 testimony, you state that, and I quote: "A market
18 cannot be effectively competitive in the absence of
19 buyer choice."

20 Could you explain what you mean by
21 that?

22 A. Yes. I mean, absence of buyer
23 choice --

24 MR. POMERANTZ: Objection, Your Honor.
25 I think we exhaustively covered effective

1 competition the last time that Professor Katz was
2 here, and while it is in his direct testimony for
3 sure, it was also in his rebuttal testimony and at
4 some point, the subject matter becomes cumulative.
5 I'm not sure why there is anything in effective
6 competition that was not already covered when he
7 was here the last time.

8 CHIEF JUSTICE BARNETT: Mr. Joseph, do
9 you want to respond?

10 MR. JOSEPH: Your Honor, it's clearly
11 in his direct testimony. I believe we are entitled
12 to present his direct testimony to the extent there
13 were issues that were not covered, and we going to
14 keep this part brief, and there were a few
15 observations that Professor Katz had coming out of
16 his direct testimony.

17 CHIEF JUDGE BARNETT: The key is to the
18 extent it was not already covered, so the objection
19 is sustained as far as cumulative testimony, but
20 you may set the stage.

21 MR. JOSEPH: Thank you, Your Honor.

22 BY MR. JOSEPH:

23 Q. Professor Katz, the question was: In
24 your written direct testimony, you state: "A
25 market cannot be effectively competitive in the

1 absence of buyer choice."

2 Could you explain what you mean by
3 that?

4 A. Yes. As I said, the buyer choice is
5 the essence of competition because it's the
6 possibility of substituting the products of one
7 seller for another that drives sellers to want to
8 compete, is they say -- like the seller says, if I
9 will give you a better offer, then maybe as a
10 buyer, you will substitute to me, so it's really
11 the essence of competition.

12 Q. Does that same conclusion apply when
13 the buyer is in a noninteractive service?

14 A. Yes, it's the same principle.

15 Q. Do you recall in your written direct
16 testimony a section starting on Page 24 titled: "A
17 monopolized market is not competitive?"

18 A. Yes.

19 Q. Just to discuss a couple of the points
20 you make in that section, suppose there is a buyer
21 that is large in some sense. In that case, could
22 the market be effectively competitive even if the
23 buyer could not engage in substitution?

24 A. No. I mean, it's the same principle.
25 If the buyer doesn't have choice, then there is no

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1 competition effective or otherwise. Sometimes,
2 particularly in antitrust, economists will single
3 out large buyers as potentially being able to
4 engage in more substitution because a large buyer
5 may be able to vertically integrate or to sponsor a
6 new entrant in order to create new options for the
7 buyer, create the possibility of substitution, but
8 I don't think anybody is saying here that any of
9 the services have the ability to start their own
10 record company or to sponsor a new major.

11 Q. In a situation where there are
12 must-have sellers and no possibility of -- excuse
13 me, is a situation in which there are must-have
14 sellers and no possibility of steering, one
15 characterized by effective competition?

16 A. No. It is just an example of what we
17 have been talking about where the buyer doesn't
18 have choice, so by definition, there is no
19 competition.

20 Q. Would it matter to your answer whether
21 the sellers have acquired their must-have status
22 lawfully or legally?

23 A. Not to the analysis of whether or not
24 there is competition. Obviously, it matters
25 whether or not it's lawful, but if they have a

1 lawful monopoly, it is still a monopoly.

2 Q. Now in Paragraph 37 of your written
3 direct testimony, you quote a portion of the Web II
4 decision which is shown on your demonstrative Slide
5 2, and in Part A of the technical appendix of your
6 written direct testimony, you then provide what you
7 consider to be a counterexample.

8 Can you explain to the judges what
9 point you are making?

10 MR. JOSEPH: Excuse me. Before you do,
11 I think we need to have the demonstratives --

12 CHIEF JUDGE BARNETT: That helps.
13 Thank you.

14 MR. JOSEPH: -- given to the Court. I
15 didn't notice that the judges were scratching their
16 heads when I said demonstratives.

17 CHIEF JUDGE BARNETT: Are we looking at
18 the one on Page 2?

19 MR. JOSEPH: Slide 2, yes, Your Honor.

20 CHIEF JUDGE BARNETT: Okay.

21 THE WITNESS: Where the first two words
22 are "a competitive." Everybody has it.

23 So what I was responding to here is,
24 you see it's a quotation from the Web II decision
25 where it was putting forth an economic principle,

1 and it is saying that a market would be
2 competitive, you can say it was competitive if you
3 had buyers and sellers that had equal bargaining
4 power and it says the reason you can think of that
5 is competitive as -- is the price you would get
6 would be closer to the competitive price than
7 either the monopoly price or the monopsony price.

8 And earlier in my testimony, it's
9 actually the preceding paragraph, I had already
10 talked about some of the broad principles why that
11 wasn't correct, and in particular, the discussion
12 of large buyers and the lack of large buyer options
13 here.

14 But then what I did in the technical
15 appendix is just provided an example to show a -- a
16 plain vanilla example to show that this wasn't
17 correct as a general statement of economics. That
18 it's not the case that whenever you have roughly
19 equal bargaining power, you get a price closer to
20 the competitive one than the monopoly one, and what
21 I did is just provided a simple example with linear
22 demand, et cetera, to say, look, just this one
23 example is enough to show it's not true.

24 Q. Is it your view that the licensing of
25 sound recording performance rates to interactive

1 services is a situation in which the buyer and the
2 seller have roughly equal bargaining power?

3 A. No, I wasn't offering the example as a
4 model of the industry, certainly not a model of how
5 bargaining works for interactive services. It was
6 really a response to this quotation, because I
7 don't think that they have equal bargaining power.
8 That is, you know, opinion -- certainly at one
9 point at least I shared with Dr. Rubinfeld, and I
10 won't belabor the famous slide and stuff, but where
11 he explained to the Federal Trade Commission that
12 the sellers have almost all the bargaining power,
13 so it is not a situation of equal bargaining power.
14 The example is just responding to this quotation.

15 Q. On Page 11 of his written rebuttal
16 testimony, Professor Talley asserts that your
17 example is, and I quote: "Inconsistent with the
18 fundamental nature of the market and conventional
19 economic theory."

20 He also objects to your model on the
21 grounds that there is no scope for a monopolist --
22 a monopsonist, I'm sorry, to truncate demand.

23 Do you agree with these criticisms?

24 A. No. As I understand his criticism
25 about -- the truncation is what he is objecting to,

1 is in sort of a standard model of a monopsonist
2 facing a bunch of perfectly competitive suppliers,
3 there is a way in which the monopsonist potentially
4 cuts back on how much it demands to drive price
5 down.

6 Now the situation in this industry is
7 very different from that, the thing about the
8 typical bargaining for interactive services. The
9 way the bargaining works is, the parties would
10 negotiate a price and then after the price is
11 negotiated, then the buyer gets to chose the
12 quantity. And in that situation and that is
13 something that's captured by the examples I have in
14 my appendix, in that situation, you don't get the
15 standard monopsony output reduction, and Professor
16 Talley apparently is objecting to that.

17 I think that objection is completely
18 misplaced because in a sense what he's doing is
19 objecting to the actual feature of the market.
20 It's not a statement about my analysis. I did a
21 completely conventional analysis of the bargaining
22 institutions in this market.

23 Q. What is your response to his claim that
24 your model is inconsistent with the fundamental
25 nature of the market?

1 A. As I say, I think that is backwards.
2 Again, it is not -- the model is not offered as a
3 full analysis of the industry. It's a
4 counterexample but that particular feature I
5 thought was important to include, and that is
6 realistic, and so it is a conventional analysis
7 having an assumption that reflects the way this
8 market actually works.

9 Q. Professor Talley also says that your
10 example can't support your categorical conclusions.
11 Do you agree?

12 A. No. I mean, the categorical conclusion
13 that I used that model for, as -- the Court was
14 surprised when I said no, I don't agree.

15 CHIEF JUDGE BARNETT: Shocked.

16 THE WITNESS: In another matter, I have
17 to say there was one where everyone in the
18 courtroom got the opposite of the answer they
19 thought I was going to would give, but not this
20 time.

21 No, the categorical conclusion, the
22 point I was making is that the statement here is
23 not a general economic proposition. And I assume,
24 I think that now it's four for four, and I think it
25 supports it.

1 BY MR. JOSEPH:

2 Q. Professor Katz, the question I think
3 everybody in the courtroom is waiting for the
4 answer for is: What is the point of your
5 demonstrative Slide No. 3?

6 A. Maybe the fundamental point is -- I
7 know you have all been in this room for a long
8 time. But the point of it is this. It's a
9 well-known point in logic, so I thought we might
10 have a fun way to illustrate it and the point is
11 this. If what you are doing is trying to prove
12 that the claim that all crows are black, if you
13 want to disapprove that claim, you only have to
14 find one white crow, you don't have to find a lot
15 of others, so I am just making the point that --
16 what I was doing in my appendix or the example was
17 doing was showing that the general proposition in
18 Web II is false.

19 Q. Well, but wait, do you think that
20 examples like the one you gave in which equal
21 bargaining power price is closer to the monopoly
22 price than the competitive price are as rare as
23 white crows?

24 A. No, actually, I don't. See, I was
25 clever, I used a diagram with equal numbers of them

1 but I also could have said, what I have done is
2 shown -- I can disprove the claim that all crows
3 are white by showing it's black because I think the
4 examples I gave are plain vanilla example. I
5 agreed that there are other examples that go the
6 different direction, but again, the point is
7 established.

8 And I think what is really more
9 important is rather than getting caught up in the
10 example, which I stand by, it makes the point I
11 wanted to make, is that we should really be
12 focusing on the features of the industry and in
13 this industry, there are multiple buyers. It is
14 not a situation of one seller and one buyer.

15 Q. In Paragraph 14 of your written direct
16 testimony, you say, and I quote: "A seller will
17 not agree to a price below its marginal or
18 incremental costs of providing the good or service
19 including the opportunity cost of doing so."

20 Can you explain what you mean by the
21 marginal or incremental costs when applied to a
22 record company licensing or selling its music?

23 A. Okay, so when a record company is
24 selling the CD, the marginal cost is going to be
25 the extra cost it triggers to sell one more CD so

1 that's going to have the production cost, the
2 distribution cost, et cetera.

3 Now when you think about the marginal
4 cost of the license, the out-of-pocket cost is
5 probably going to be zero or near zero. If what
6 you think is you already have a license with a
7 particular service, and they're going to have one
8 more play. I mean, the record company may do
9 essentially nothing, so in that sense, the marginal
10 cost is near zero, but we also -- as an economist,
11 we're taking into account opportunity costs, and
12 would say, okay, if the record company -- if there
13 is one more play of its intellectual property, one
14 more play of its recording, that may affect its
15 sales of other products, and the record company is
16 going to want to take that into account and that's
17 what the notion of opportunity cost is getting at,
18 is saying, if there is one more play of -- when you
19 are recording, how does that affect your revenues
20 and profits from other sources.

21 JUDGE STRICKLER: Would you say --
22 first of all, good morning.

23 THE WITNESS: Good morning.

24 JUDGE STRICKLER: Would you say that
25 the concept of opportunity cost is essentially the

1 same as the concept of substitution as is set forth
2 in the statute that we are dealing with?

3 THE WITNESS: I would say substitution
4 and also promotion. If we take those as two sides
5 of the same coin --

6 JUDGE STRICKLER: Promotion being a
7 negative opportunity.

8 THE WITNESS: Exactly. Exactly.
9 Again, I'm not offering a legal opinion but
10 certainly as an economist, I think that is what
11 it's getting at.

12 JUDGE STRICKLER: I want to stay with
13 your Paragraph 14 for the moment. The first
14 sentence in your Paragraph 14 of your written
15 direct testimony says, quote: If interpreted
16 literally and narrowly, the willing buyer/willing
17 seller standard would exhibit a broad range of
18 indeterminately the level of license fees."

19 Do you see that?

20 THE WITNESS: Yes.

21 JUDGE STRICKLER: Do you mean by that,
22 that there is an interpretation of the willing --
23 economically, that there is an interpretation of
24 the willing buyer/willing seller standard, other
25 than the literal and narrow approach that would

1 exhibit an absence of indeterminately such that we
2 can set a rate by applying an economic version of
3 the willing buyer/willing seller standard?

4 THE WITNESS: It is certainly my view
5 that you can interpret it economically as saying
6 what we mean by a willing buyer is that the buyer
7 has choice and where the choice is beyond just --
8 you either take the firm's product or you don't,
9 because in that sense, any buyer has a choice. But
10 that it has meaningful choice and that really gets
11 into the point of effective competition.

12 Now I think that saying that what we
13 mean by a willing buyer is -- a willing buyer is
14 one who's in a situation with effective
15 competition, that by itself, is not going to get
16 rid of all the indeterminates, it's going to narrow
17 things down, but as I think you've heard from
18 multiple witnesses, and here from me about, is that
19 the concept of effective competition doesn't give
20 you a precise number by itself. It is a little
21 fuzzier concept.

22 JUDGE STRICKLER: When you interpret it
23 literally and narrowly as you suggest in Paragraph
24 14 or under the effective or workable competition
25 standard, either way we have indeterminately and --

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1 either way we have a range of indeterminately --

2 THE WITNESS: You're going to have a
3 range either way. It's just going to be much
4 broader this way and as I say --

5 JUDGE STRICKLER: Broader which way?

6 THE WITNESS: Much broader, if it is
7 just interpreted as saying, well, the buyer entered
8 into the agreement without literally having a gun
9 put to his or her head.

10 JUDGE STRICKLER: There would be no
11 indeterminately in that situation. In a take it or
12 leave it situation, we have determinately, you
13 either pay the price the seller demands or you
14 don't enter the market at all, so we have
15 indeterminately, but not necessarily good
16 indeterminately.

17 THE WITNESS: There is a sense, but if
18 you are saying that that would be the high end and
19 then the low end would be the seller's marginal
20 cost, then I am saying that almost any price --
21 basically, you would be saying any price between
22 marginal cost and presumably -- well, actually in a
23 market with complements, it would be saying, look,
24 any price is fine between marginal costs and the
25 price that would come out of a situation where we

1 have complements, that is actually higher than the
2 monopoly price.

3 JUDGE STRICKLER: I have a question for
4 you about marginal cost pricing in this market.
5 Perhaps counsel can move along because it comes up
6 a little bit later in your written direct
7 testimony.

8 MR. JOSEPH: Thank you, Your Honor.

9 JUDGE STRICKLER: Thank you.

10 BY MR. JOSEPH:

11 Q. Could you provide an example of how
12 opportunity costs would apply to a record company
13 when licensing to an on-demand service?

14 A. Yeah, I think the next demonstrative --
15 for some help in thinking about that, so we think
16 of an on-demand service, it's here, shown as an
17 interactive service, using those terms
18 synonymously. If the record company licenses an
19 additional play, the marginal play, through the
20 interactive service, that could adversely affect
21 its sales of downloads to own or its sales of CDs,
22 and so that would be an opportunity cost of
23 licensing to the interactive service, that there
24 would be some forgone profits that the record
25 company otherwise would have gotten from downloads

1 or CD sales.

2 Q. Could you provide an example of how
3 opportunity costs would apply to a record company
4 when licensing an Internet simulcast of the
5 terrestrial broadcast?

6 A. So in the simulcasting case, one that
7 happened -- Judge Strickler and I just were talking
8 about this and we've got to think about negative
9 opportunity cost as a possibility as well, that an
10 additional play on a simulcast, then it's going to
11 have promotional effects that actually encourage
12 the sale of downloads and CDs, then it would
13 actually have a negative opportunity cost because
14 the additional play would actually be simulating
15 other sales for the record company that are
16 profitable.

17 Q. In Paragraph 8 of his written rebuttal
18 testimony, Dr. Blackburn claims that promotion that
19 shifts share among record companies, what he calls
20 diversionary promotion, should not be taken into
21 account in assessing opportunity costs or benefits
22 as part of determination of an effectively
23 competitive price.

24 Do you agree as a matter of economics?

25 A. No, I don't agree with that at all,

1 because what he is saying is, suppose there is a
2 form of promotion, and what it does is it's going
3 to shift share among record companies.

4 Well, if I am a record company and I am
5 competing, that's a good thing from my perspective.
6 If I can shift share from my rivals to me and make
7 money on it, I'm going to count that, so when I'm
8 thinking about what sort of deals I'm going to
9 enter into, I'm going to count that kind of -- that
10 diversionary promotion is going to count, and that
11 is something I'm going to take into account in
12 thinking about the costs and benefits. It's going
13 to affect my decision calculation.

14 JUDGE STRICKLER: So if I understand
15 your testimony correctly, you are saying that
16 promotion can have two effects. It can expand the
17 entire pie, more listeners, more music, more
18 revenue flowing into the market for all services,
19 but it could also simply divide the existing pie,
20 the existing percentages in either way, that --
21 those are examples of competitive functions.

22 THE WITNESS: That's absolutely
23 correct. So Dr. Blackburn is drawing that
24 distinction under -- different names of distinction
25 appears all the time in economics, and what I am

1 testifying to is that both of those types of
2 promotions would count. If I am a competitor and I
3 am thinking about what my opportunity cost is or
4 what my benefits are of getting the promotion.
5 There is no reason that I would exclude one and
6 include the other.

7 JUDGE STRICKLER: Thank you.

8 BY MR. JOSEPH:

9 Q. Do you recall that Dr. Blackburn
10 asserts that the statutory standard compels the
11 judges to ignore diversionary promotion?

12 A. Yes, I do.

13 Q. Could you explain to the judges why you
14 disagree with Dr. Blackburn on this point?

15 A. So, I think, again, turn to Slide 5 in
16 my deck and let me walk through my understanding of
17 what Dr. Blackburn had to say.

18 The first quotation is summarizing -- I
19 believe his argument in his own words, and where he
20 is saying, you notice he is singling out
21 diversionary promotion, so the one that's shifting
22 share among the companies, and he says that is not
23 relevant or doesn't answer the question at issue
24 here, and he is saying how would the Webcasting
25 engage in substitution of promotion so just what we

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1 have been talking about. You notice he says
2 affects the copyright owners, plural, so he's
3 talking about the entire industry, stream of
4 revenues from their sound recordings.

5 So what he is saying is, look, the
6 statutory standard is asking how would the
7 industry's revenues be affected, in a sense, what
8 would be the industry if it were a monopolist, what
9 would be the industry's opportunity costs and he is
10 saying that's the way we should think about it.
11 That is how he is summarizing the statute.

12 Now the reason I disagree with him can
13 be seen in the second quotation which is also from
14 Dr. Blackburn's written rebuttal report and here,
15 instead of paraphrasing the statute to our
16 advantage, he quotes it, and if you look and you
17 ask yourself what is the difference between the
18 quotation and the paraphrase, and I'm going to get
19 beyond the grammar in just a moment to talk about
20 what it means for economics.

21 If you look at the statute, it says the
22 sound recording copyright owner, singular, other
23 streams of revenue from its sound recordings as
24 opposed to from their sound recordings. If one
25 steps back and looks at the standard overall, and I

1 suspect most of the people in this room have that
2 memorized by heart better than I do, it talks about
3 a willing buyer and willing seller and it then
4 talks about competitive conditions and it's saying
5 it is singular, singular in context.

6 Well, let's get beyond grammar, what
7 does that mean to the economics? There is a big
8 difference in the point of view of economics in
9 thinking about competition. If whether you are
10 talking about a single record company competing
11 with other record companies and asking itself, all
12 right, what are the benefits of promotion to me,
13 that is very different than asking the question,
14 well, what are the benefits of the promotion to the
15 entire industry, or to put it another way, the
16 first box, Dr. Blackburn is simply saying that --
17 let's think about the standard as what would a
18 monopoly do and then the second box where he is
19 quoting the statute, it is asking what would a
20 permanence in a competitive situation do, and those
21 are obviously very different.

22 Just to wrap up, obviously, I think the
23 -- what matters, right, is what the standard says
24 not his paraphrase, right, so I completely disagree
25 with his conclusion. I think he is asking the

1 judges to put effective competition aside in this
2 section. He's asking them to adopt a monopoly
3 standard which is not my understanding of what the
4 standard is.

5 Q. Thank you. Professor Katz, do you
6 recall that in Section 8A of your written direct
7 testimony, you testified that record company's
8 behavior with respect to terrestrial radio provides
9 valuable economic insights regarding the
10 appropriate statutory rate for simulcasting?

11 A. Yes, I recall that.

12 Q. In Paragraph 7 of his written rebuttal
13 testimony, Professor Rubinfeld wrote, and I quote:
14 "Since Congress has chosen not to create a
15 terrestrial performance rate in sound recordings,
16 there necessarily is no market for terrestrial
17 licenses in them. Terrestrial radio has no
18 relevance under the willing buyer/willing seller
19 standard.

20 Do you agree with his claim that
21 terrestrial radio has no relevance for applying the
22 willing buyer/willing seller standard for
23 simulcasting?

24 A. No, I don't. As I discussed in my
25 testimony, while it is true that generally, you are

1 not going to see a market or payments for the right
2 to broadcast on terrestrial radio for sound
3 recordings, there is still a lot of marketplace
4 behavior we can observe and I think appropriately
5 draw inferences from it and the central lesson I
6 draw from it is this: That even though the record
7 companies are getting no license payments for play
8 on terrestrial radio, they spend tens and even
9 hundreds of millions of dollar a year, seeking
10 promotion on terrestrial radio, and so what that's
11 telling me, right, is that that is valuable to them
12 to get that play even though they are getting no
13 royalties from it, so what it is telling me is that
14 they perceived -- to put it in the language we have
15 been talking about, they perceived there would be a
16 negative opportunity cost or in plain English, they
17 see a benefit of getting terrestrial radio air
18 play, and then just to wrap up, that as -- again,
19 as I have talked about in my testimony, in many
20 ways, I think in all the critical ways,
21 simulcasting is like terrestrial radio and so a
22 reasonable inference is that it would have similar
23 promotional benefits and therefore, what it is
24 telling us is it does have very low opportunity
25 costs associated with it.

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1 JUDGE STRICKLER: But even though we
2 see spending on promotion -- significant spending
3 on promotion, that really doesn't answer the
4 question, does it, as to whether terrestrial radio
5 has a net promotion effect. It could well be that
6 the record companies see -- at least arguably,
7 significant substitution effects, negative
8 substitution effects. They still want to mitigate
9 that by getting whatever promotional benefits they
10 could out of it. It's a little bit like analogous
11 and saying, well, we have a trade surplus because
12 we see a lot of exports, but ignoring all the
13 imports that swamp the exports without a market.
14 How do we know?

15 THE WITNESS: What I was saying that
16 that analogy, I believe breaks down is if the
17 record company concluded that on balance, right,
18 there could be -- I take your point certainly and
19 agree that there could be effects both directions,
20 but if the record company concluded that on balance
21 the terrestrial air play was harmful to the record
22 company, then they should not be seeking to get
23 additional air play, right.

24 They should say, well, there is some
25 effects going some way, some the other, on balance,

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1 it's negative so I should do what I can to prevent
2 air play.

3 JUDGE STRICKLER: Would they still want
4 to have air play just to create a change in
5 relative shares or does your position hold even if
6 it is just an attempt to promote a change in
7 relative shares?

8 THE WITNESS: No. It certainly would
9 hold if it's an attempt to -- relative shares.
10 That is the point in talking about Dr. Blackburn.
11 The diversionary promotion is going to be important
12 to a competitor so the record companies that are
13 competing with each other, they will count on
14 promotional diversion as a benefit and that may
15 well be the main driver of what is happening with
16 radio.

17 JUDGE STRICKLER: If you're going to
18 get the substitution effect anyway because radio is
19 going to play music, some music, sort of like you
20 have lemons in it because you see a substitution
21 effect, you figure, well, I might as well get --
22 you're going to get that substitution effect
23 anyway, shouldn't I at least try to promote my
24 music and get whatever promotional effect out of it
25 or is there something wrong with that?

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1 THE WITNESS: No, that is exactly right
2 and the way you just described is competition,
3 right. That is exactly what is going on. When you
4 are a competitor, you're happy if you can get
5 completely new business and expand the market, but
6 you are also happy if what you are doing is getting
7 business you are taking from your rivals.

8 JUDGE STRICKLER: Right. I may lose X
9 percent, because there will be a substitution
10 effect, people will be happy to hear that music on
11 the radio and they'll go out and buy it, some
12 people, but you'll get a promotional effect to the
13 extent that if you are Sony, you may take away some
14 business from Warner in the process. It is still
15 net negative, but less negative than it otherwise
16 would be.

17 THE WITNESS: Well, now we've got to be
18 careful, because it is net positive for Sony. It
19 may be net negative for the industry, but that is
20 true generally with competition, right. I mean,
21 once an industry moves away from being a cartel,
22 that's why industries try to cartelize, sometimes
23 even when it is illegal, because price competition
24 may be a net negative for the industry, but it's a
25 positive for consumers.

1 JUDGE STRICKLER: Let me say arguably
2 Sony could lose ten percent of its sales through
3 terrestrial radio, because that has a sub --
4 overall substitution effect, if we claw back, so to
5 speak, three percent by promoting successfully and
6 taking that away from the other record companies,
7 so it's still net negative of seven, but it
8 mitigated the loss of the ten percent just because
9 terrestrial is overall substitutional, that was
10 able to shift the market shares and make the best
11 of a bad situation. Doesn't that make sense?

12 THE WITNESS: Two things, I think we
13 are talking about as a hypothetical, let me talk
14 about because I think the notion that it would -- I
15 am not aware of evidence that would have that kind
16 of loss on it, but it would still be the case in
17 that situation that in thinking about its
18 opportunity costs and thinking about what it would
19 do as a -- what it's doing as a competitor and
20 here, the competition is taking the form of
21 promotion, it is going to take into account the
22 part about clawing it back.

23 So what I think economics would say on
24 that is if there were a price, suppose there were a
25 sound recording right for terrestrial radio, Sony

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1 in thinking about what price it would charge for
2 that, would then say, well, maybe I don't like the
3 fact that radio exists overall, but when I go out
4 and negotiate, I got to take into account my
5 ability to claw back, that I have to compete.

6 So I agree with you certainly
7 hypothetically, there could be these effects, but
8 again, if we are asking what would the competitive
9 outcome be, they're going to focus on that three
10 percent in your example.

11 JUDGE STRICKLER: Right, but the reason
12 I brought up the example, the numbers certainly are
13 arbitrary because I feel like it takes us back to
14 Professor Rubinfeld's point, is that it's the
15 absence of the market because there is no
16 performance right that we can't balance out the
17 substitution and promotional effects, because we
18 just don't see them in action. We see them in
19 promotion, but we're missing the other side of it
20 because we just don't see a market that will allow
21 us to decide whether any payment would otherwise be
22 made and if so, who would pay whom.

23 THE WITNESS: See, that is where I
24 completely disagree because it's a separate -- it's
25 a different point, because suppose there were a

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1 market, okay, the point about saying, well, in your
2 hypothetical example, the point saying, well, you'd
3 lose the ten percent from the existence of radio,
4 that would be irrelevant to bargaining over the
5 price if you are Sony. Sony would be saying to
6 themselves, I have a choice. I can refuse to
7 license to you if we are talking about the radio
8 station, fine, I'm going to lose the ten percent or
9 I can license to you and lose the ten percent.

10 It's not relevant to that decision.
11 What Sony would be focusing on as a competitor is
12 the three percent that will make a difference
13 whether or not I have this deal.

14 JUDGE STRICKLER: If Sony is losing ten
15 percent in a hypothetical market, wouldn't it say
16 I'm just not going to allow you, radio station, to
17 play my music and avoid that ten percent and divert
18 that over to record sales?

19 THE WITNESS: No. If I understood your
20 hypothetical correctly, the ten percent would be
21 lost anyway because you are saying if Sony didn't
22 do the deal, it would lose it to somebody else.

23 JUDGE STRICKLER: No, I am talking
24 about losing through substitution, because
25 terrestrial radio substitutes for records.

1 THE WITNESS: Then I want to step back.
2 If you are saying the following, that Sony has a
3 deal where it gets play, it is going to lose ten
4 percent but then can claw back three percent, then
5 it wouldn't engage in -- I think you still have
6 this thing -- also then would not want promotion.
7 It would just say, look, every time there is
8 another play --

9 JUDGE STRICKLER: I'd lose money.

10 THE WITNESS: Yeah, so why then it
11 wouldn't do promotion either.

12 JUDGE STRICKLER: But it would if those
13 numbers were flipped around. If you lose three
14 percent overall by the plays, but you can claw back
15 ten percent by shifting market shares, that is what
16 I took from Professor Rubinfeld's criticism is that
17 we don't know the answer to that.

18 We don't even know which way the money
19 would flow. Use payola in the past, but you don't
20 know if the money is flowing from the record
21 companies to the radio stations or from the radio
22 stations to the record companies in a hypothetical
23 market, so how can we use -- why is Professor
24 Rubinfeld wrong? I don't see how he is wrong.

25 THE WITNESS: Because -- so first off,

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1 to the extent he says we can't tell which direction
2 it goes, I agree with that, because it's close to
3 zero and you can imagine it being positive or
4 negative.

5 I think that fact alone is telling us
6 something that we are saying in the case like this
7 and I think that carries over to simulcasting, we
8 are talking about rates that are near zero because
9 we can see benefits and costs going both ways. So
10 I think actually that -- we are learning something
11 but second of all, I think it is just wrong for him
12 to say that essentially there is a different
13 economics for price than there is for promotion,
14 because in the end, they are going to have similar
15 effects, they have obviously worked through
16 slightly different mechanisms, but they're going to
17 have similar effects on the record company.

18 If the record company thinks that every
19 play hurts it, when we balance things out, it
20 shouldn't be promoting incremental plays. That
21 would be irrational for them to do that. So the
22 fact that they want additional plays and they spend
23 money to get additional plays, says the record
24 company has concluded that on balance, it's good
25 for that record company to get more plays. If it

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1 is good for them to get more plays, that means they
2 have a negative opportunity cost and that is
3 something that is then going to push -- if they
4 were bargaining over price, it's going to tend to
5 push price downward, so I think it is telling us
6 that they perceive there is a benefit of the
7 margin.

8 So that is the part I take away from it
9 is given that the price they are getting is zero
10 and given they want to push to have it happen, it
11 is they perceive a negative opportunity cost, at
12 the individual firm level. I am not saying at the
13 industry level, but at the individual firm level,
14 the record company perceived there to be a negative
15 opportunity cost, and that I think is the part that
16 Dr. Rubinfeld is ignoring.

17 JUDGE STRICKLER: Thank you.

18 BY MR. JOSEPH:

19 Q. And just to be clear, a negative
20 opportunity cost is an opportunity benefit. Would
21 that be another way to put it?

22 A. Yeah, I'm not sure I've ever heard
23 economists use that term, but yes, it is a benefit
24 at the margin.

25 Q. Professor Katz, you've explained that

1 simulcasting can stimulate the sales of recorded
2 music, but does it take business away from
3 somewhere else?

4 A. That is clearly, you know, it's a
5 possibility. I mean, some of what it can be doing
6 is just bringing in completely new listening, but
7 the listeners also can come from other sources of
8 music, and in particular, I think the evidence
9 indicates it is primarily coming from terrestrial
10 radio.

11 Q. What would that mean for the
12 calculation of opportunity costs?

13 A. Well as we have been talking about,
14 terrestrial radio right now, there isn't a right
15 that the record companies have to charge for it.
16 When you are taking business away from terrestrial
17 radio, that part doesn't have an opportunity cost
18 and, in fact, that what it's going to tell you then
19 is that if you are a record company, if you are
20 licensed to a simulcaster and you are getting a
21 royalty rate, that is going to be a benefit to you
22 that you were not getting before, because you were
23 not getting paid when it's on terrestrial and now
24 you are getting paid, so another way of just saying
25 it is that element of opportunity cost would be

1 zero.

2 Q. Given all of that, what would the
3 marginal cost including any opportunity costs be
4 for licensing recordings to simulcasters?

5 A. What this is saying is this discussion
6 we had so I won't belabor it, it's saying that it
7 certainly could be negative in some cases and for
8 some recordings and some simulcasters, but it, in
9 any event, is going to be close to zero.

10 Q. Following it up to the end point, what
11 would the implications be for a willing seller of
12 having marginal costs including opportunity costs
13 near zero?

14 A. Again, that is going to affect their
15 decision calculus and they're going to realize that
16 their costs are low so that's going to tend to have
17 lower prices all else equal. In fact, you could --
18 in specific cases and I think we see that
19 essentially in terrestrial radio, it's the
20 equivalent of having a negative price even.

21 Q. Is all of this related to the efficient
22 component pricing rule that Judge Strickler has
23 asked about?

24 A. At a core level, they are, and the
25 efficient component pricing rule is -- a central

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1 part of it is to look at the seller's opportunity
2 cost in a situation where if an upstream seller
3 sells to a downstream buyer, that could affect the
4 upstream seller's profit streams from other
5 sources. So in that sense, these things are very
6 closely related.

7 Now I do want to be clear that the
8 efficient component pricing rule was developed
9 under situations or under the assumption that the
10 downstream firms were perfect substitutes for each
11 other, which clearly I think you have heard from
12 several witnesses, that these are -- the downstream
13 products are differentiated. They are not
14 identical to one another and also the rationale for
15 the efficient component pricing rule envisioned
16 regulations that downstream prices so that in this
17 market, it would be the streaming prices and record
18 companies, so this of course, we don't have, but
19 the basic principle of the ECPR would be that you
20 would -- the downstream buyer would pay the
21 upstream seller the upstream seller's opportunity
22 cost and what it would say here, for example,
23 applied to the case of simulcasting is that the
24 efficient component pricing rule would tell you
25 that the price should be near zero of the

1 simulcasting because the opportunity cost and
2 marginal costs are near zero.

3 JUDGE STRICKLER: And the reason the
4 opportunity cost, according to your testimony,
5 would be a zero is because there is such a
6 differentiation in the product that there is no
7 substitution lost, according to your testimony, if
8 the song is simulcast, it's not a loss to the
9 record company because they are not losing a play
10 or a subscription or advertising on an interactive
11 service or on a download.

12 THE WITNESS: I wouldn't -- I want to
13 be clear. I wouldn't say that there's no such
14 effects. There can certainly be to some people,
15 but primarily, it's taking business from
16 terrestrial radio and it is having these beneficial
17 effects on the sales of downloads and records, but
18 there could be. I would expect there is some other
19 substitution with other services.

20 JUDGE STRICKLER: To the effect there
21 is any of other substitution effects as you
22 testified, that would be where the efficient
23 component pricing rule would be applicable but only
24 in those situations where there would be that level
25 of substitution?

1 THE WITNESS: I would say at a broad
2 level, the rule would be applicable if you'd want
3 to take it all into account. The efficient
4 component rule would say, well, wait a minute, you
5 are mainly taking away terrestrial radio, okay, so
6 that is telling us, in that case, the opportunity
7 cost is zero, then as I say, you'd get a negative
8 component when it is helping sales, and then there
9 would be some offset the other direction to the
10 extent you were taking away from on-demand sales
11 and I certainly -- on-demand streaming revenues,
12 and I think there would be some of that, but I
13 think the evidence indicates that overall, you are
14 going to end up with a net effect that's near zero.

15 JUDGE STRICKLER: You're saying that
16 the ECPR framework works in all situations, but we
17 have to be very cognizant of measuring or
18 estimating at least what the opportunity cost as
19 your counsel pointed out, opportunity benefit would
20 be in order to apply it properly?

21 THE WITNESS: Exactly.

22 BY MR. JOSEPH:

23 Q. Now you just told the judges what the
24 ECPR might imply for a licensed price for
25 simulcasting.

1 What about noninteractive services
2 generally?

3 A. I think an important point to keep in
4 mind in applying the ECPR to the noninteractive
5 services generally is -- again, to the extent the
6 record shows and I think it is where the evidence
7 does point us that the diversion of the
8 substitution is coming from terrestrial radio.
9 It's again telling us that the opportunity cost and
10 therefore the ECPR price is going to tend to be
11 low.

12 Q. Now you have testified that licensing
13 to a simulcaster would have a particularly low
14 marginal cost for a record company. Are there
15 other ways in which simulcasting is different?

16 A. Yes, and I won't go through them, but I
17 have a -- the next demonstrative just summarizes
18 the neutral points made in my testimony. Of
19 course, these are also points I think some other
20 witnesses made, but as we have been talking about
21 the net promotion, we talked about earlier, so I
22 won't repeat, about non-music content playing a
23 larger role that its advertisers supported and then
24 as you've heard, I guess somewhat colorfully from
25 Professor Weil, that there are also accounting

1 problems.

2 Counsel promised me that the Court
3 would know what I meant when I said that.

4 JUDGE STRICKLER: You mean the word
5 colorful?

6 THE WITNESS: Yes. So yes, there
7 clearly are these differences.

8 BY MR. JOSEPH:

9 Q. Do you also recall that Professor
10 Rubinfeld admitted in his cross-examination that
11 simulcasting is different from other streaming
12 services and he did not take simulcasting into
13 account when conducting his benchmark analysis?

14 MR. POMERANTZ: Objection, Your Honor.
15 I think he's leading the witness at this point.

16 CHIEF JUDGE BARNETT: Sustained. He
17 needs to reframe the question.

18 BY MR. JOSEPH:

19 Q. Professor Katz, do you recall what
20 Professor Rubinfeld said about whether simulcasting
21 was similar or different -- let me withdraw that
22 question.

23 A. Can I cut through one thing? It so
24 happens by coincidence, I read the opening pages of
25 Dr. Rubinfeld's cross-examination fairly recently,

1 in which counsel asked him a set of questions about
2 these things. You could just say, is there
3 anything you want to say about Dr. Rubinfeld and I
4 will give you the same answer.

5 Q. Thank you, Professor Katz. I think the
6 record will speak for itself with respect to what
7 Dr. Rubinfeld said, but let's take into account the
8 unique characteristics of simulcasting.

9 What conclusion, if any, do you draw
10 from -- withdrawn.

11 Taking into account the unique
12 characteristics of simulcasting, what conclusions,
13 if any, do you draw, A, for the level of an
14 effectively competitive license fee and, B, for the
15 lower bound of reasonableness for a statutory rate?

16 MR. POMERANTZ: Your Honor, I think
17 this is beyond the scope of his testimony. He
18 specifically did not offer any testimony in his --
19 actually, in any of his written testimony about
20 whether simulcasting should get the same or
21 different rate than other Webcasting.

22 I believe Mr. Joseph is now trying to
23 elicit that testimony.

24 MR. JOSEPH: Your Honor, he testified
25 specifically about what he believed an effectively

1 competitive license fee for simulcasting would be.
2 That is the point of his boundary discussion and he
3 specifically discussed the lower boundary.

4 MR. POMERANTZ: I don't object to that
5 question, because that is not in comparison to
6 other Webcasting, so if he specifically wants to
7 ask him what he thinks the zone of reasonableness
8 is for simulcasting rates, that is obviously
9 something he did testify to in his testimony. It's
10 just the comparison to other Webcasting where he
11 did not offer an opinion on that subject.

12 JUDGE STRICKLER: Is there a section
13 you can point to in his written direct testimony
14 where he did make such a comparison?

15 MR. JOSEPH: Your Honors, my question
16 actually didn't call for a comparison. My question
17 was asking about simulcasting and he certainly
18 speaks at length about simulcasting in --

19 CHIEF JUDGE BARNETT: That's true. To
20 the extent you are not asking for a comparison, the
21 objection is overruled. Go ahead.

22 BY MR. JOSEPH:

23 Q. Professor Katz, what conclusions, if
24 any, taking into account the characteristics of
25 simulcasting that you described, do you draw, A,

1 for the level of an effectively competitive license
2 fee for simulcasting and, B, for the lower bound of
3 reasonableness for a statutory rate for
4 simulcasting?

5 A. So as I said in my written direct
6 testimony, in fact at Paragraph 84, I said that the
7 -- it indicates the effectively competitive fee
8 could well be negative, in some situations for some
9 simulcasters or some recordings, but that I did not
10 reach a conclusion that that should be a negative
11 zone of reasonableness because there clearly is
12 heterogeneity in the net promotional effects, and
13 because I think there is a danger of gaming the
14 system if you started to have a negative license
15 fee, what I concluded is that the lower bound of
16 the zone of reasonableness would be zero.

17 MR. JOSEPH: Now, Your Honors, I am
18 actually going to ask Professor Katz to respond to
19 some comments by Professor Rubinfeld, which under
20 the rules, we agreed he is entitled I believe to
21 do, so let me ask the question.

22 BY MR. JOSEPH:

23 Q. In Paragraph 205 of his written
24 rebuttal testimony, Professor Rubinfeld says that
25 he thinks simulcasting should not pay a separate

1 rate and he raises several objections. Let's
2 discuss those objections.

3 In Paragraph 206, he claims that a
4 separate rate for simulcasting is, quote,
5 "unnecessary," because he believes the market will
6 take care of themselves. He says, quote: "If it
7 turns out that there are distinct segments of the
8 market for which this default rate, meaning a
9 single rate set by the judges is too high, it would
10 be in the interest of both the services and the
11 labels to negotiate a direct deal."

12 Do you agree?

13 MR. POMERANTZ: Your Honor, I believe
14 this is again beyond the scope. When Professor
15 Rubinfeld did address the issue in his rebuttal
16 testimony about whether simulcasters should pay a
17 different and lower rate, Professor Katz never
18 expressed an opinion on that even at his
19 deposition, which was after he had seen the
20 rebuttal testimony of Professor Rubinfeld.

21 So I think by the fact that he has
22 chosen not to offer any testimony in his direct
23 testimony, in his written rebuttal testimony or at
24 his deposition on whether simulcasters should pay a
25 lower rate means that it's beyond the scope of his

1 testimony to now address this in this context.

2 JUDGE STRICKLER: Question for you:

3 Assuming that's true, and let's say that the
4 experts for the Pandora say or don't testify about
5 the potential disparity between the two rates
6 because they have different opinions as to what the
7 rates should be, does that mean nobody ever
8 addresses Dr. Rubinfeld's written rebuttal
9 testimony in this way on direct examination because
10 each one has a starkly different rate and neither
11 one in their own particular testimony discussed the
12 difference, even though we know the difference is
13 out there and Dr. Rubinfeld discussed it, does that
14 mean we don't hear from any of the services's
15 witnesses or the NAB expert witness with regard to
16 whether there should be a disparity?

17 MR. POMERANTZ: Absolutely. I think
18 that we have rules here they are supposed to put
19 their opinions in in writing. And by the way,
20 iHeart also has simulcast services and they could
21 have put something in in writing. And so if the
22 only fair way to govern the process is if they
23 don't offer the opinion in their direct, in their
24 rebuttal or in their deposition, which occurred
25 after both of those, it's only fair to us not to

1 then allow the opinion come into evidence at this
2 point under the guise of rebutting Professor
3 Rubinfeld.

4 JUDGE STRICKLER: You're saying that he
5 -- got to the last question I have here, you're
6 saying that even though we have that rule that
7 apparently we've agreed upon, that you can address
8 criticisms in your direct testimony of -- that were
9 made in rebuttal testimony against you, this
10 doesn't fall within that.

11 MR. POMERANTZ: Well, clearly,
12 Professor Rubinfeld wasn't criticizing Professor
13 Katz by saying the two rates should be the same.
14 That is not a criticism of Professor Katz because
15 he didn't offer a contrary opinion, which was that
16 the rates should be different. So I think you're
17 trying --

18 JUDGE STRICKLER: You don't think that
19 is implicit?

20 MR. POMERANTZ: They could have said
21 it. I mean, really, they were motivated. If they
22 thought that simulcasters should get a lower rate
23 and they thought they had analysis that supported
24 that, they were motivated to say so in their direct
25 testimony, in their rebuttal testimony and in their

1 deposition. I don't think it's fair to us to then
2 have it come in at this point in this way when the
3 record was clear up to this point, that neither NAB
4 or iHeart, both of whom are simulcasters, put in
5 any evidence that the simulcast rate should be
6 lower than the non-simulcast rate.

7 CHIEF JUDGE BARNETT: Mr. Pomerantz,
8 isn't that what we are to conclude from this
9 testimony from Professor Katz in which he says it
10 could effectively be negative, but he doesn't want
11 to go there. I mean, that is lower than what
12 Professor Rubinfeld is proposing. No?

13 MR. POMERANTZ: It is lower -- he's
14 proposed a lower -- NAB has proposed a lower rate
15 than Professor Rubinfeld. I'm not disagreeing with
16 that. The real question here is whether it's
17 permissible at this point in the proceeding to
18 allow an opinion from Professor Katz that the
19 simulcast rate should be lower than the
20 non-simulcast rate. If you allow that testimony
21 in, it is the only testimony that they will have to
22 point to that makes that recommendation. It has
23 not come in to any --

24 CHIEF JUDGE BARNETT: I'm just saying,
25 isn't that what he said in his direct testimony?

1 MR. POMERANTZ: We're willing to live
2 with that direct testimony. I don't think it is
3 what he said. In fact, I asked him at his
4 deposition expressly, are you -- is it your opinion
5 that simulcasters should be paid a lower rate or a
6 different rate than non-simulcasters? He said no,
7 I'm not offering that opinion. That was just a
8 month ago, month and a half ago.

9 It was after all of the written
10 testimony, both direct and rebuttal. But to now
11 come in here and offer that opinion and then have
12 it be the only piece of evidence in front of Your
13 Honors where anybody is saying that the simulcast
14 rate should be lower, I don't think it's fair under
15 the rules.

16 CHIEF JUDGE BARNETT: Thank you, we've
17 heard you.

18 Mr. Joseph, are we going to have a
19 witness who's going to say simulcasting rates
20 should be different?

21 MR. JOSEPH: Your Honor, we have a
22 witness that says what the simulcasting rate should
23 be, and he has testified as to what he believes the
24 economics point to for the simulcasting rate. That
25 is -- we don't have --

1 CHIEF JUDGE BARNETT: Who?

2 MR. JOSEPH: Professor Katz.

3 CHIEF JUDGE BARNETT: Yes. According
4 to Mr. Pomerantz, he asked him in his deposition,
5 do you think simulcasting rates should be
6 different? He said no.

7 MR. JOSEPH: Only because he didn't
8 take the position on what other rates should be.
9 The only position he's taking is simulcasting
10 rates. Now we have Professor Rubinfeld coming
11 along directly criticizing NAB saying the NAB's
12 direct case proposes segmentation of a different
13 sort by proposing broadcaster specific rates and
14 terms as Paragraph 205. It implicitly suggests
15 that simulcasters should be subject to their own
16 distinct rates, so Professor Rubinfeld is directly
17 taking on the proposition that simulcasters should
18 be paying a low rate.

19 JUDGE STRICKLER: But Professor
20 Rubinfeld gets to that point by comparing two
21 things. He takes a look at the testimony of
22 Professor Katz and he sees a lower rate. Then he
23 looked at the testimony of the other experts,
24 Professor Shapiro and whatever other experts you
25 have on the other side, and say, these two rates

1 are different, and I, Professor Rubinfeld, have an
2 opinion as to the import of that and I want to
3 express it.

4 That's doesn't mean any other witness,
5 in fact, also did the same thing and compared the
6 two rates as I understand Mr. Pomerantz is
7 offering.

8 MR. JOSEPH: I understand that's his
9 argument.

10 JUDGE STRICKLER: And he's correct in
11 that, that no other witness actually did that. I
12 asked you to point to me where Professor Katz made
13 that comparison and you went back to Professor
14 Rubinfeld.

15 MR. JOSEPH: It is true that he did not
16 make an explicit comparison. He made a
17 recommendation with respect to simulcasting. That
18 carries with it potentially the implication if
19 Professor Rubinfeld is proposing one rate and then
20 says, don't worry, the market will take care of
21 itself, Professor Katz should be able to respond to
22 the statement that the market will take care of
23 itself.

24 That is actually what I was planning to
25 ask him, what his view is of Professor Rubinfeld's

1 claim that the market will take care of itself.

2 JUDGE STRICKLER: Just so -- so you
3 wanted to ask him before he confirms it. You
4 wanted to ask him not about the comparison but
5 about Professor Rubinfeld's point that the market
6 will take care of it, if the rate for simulcasting
7 is above the market rate? That's the question you
8 wanted to ask him?

9 MR. JOSEPH: If the rate the judges set
10 is above what the rate should be for simulcasting
11 that the judges should not worry about that,
12 because simulcasters will be able to take care of
13 it.

14 JUDGE STRICKLER: Just that question?
15 That is not a comparative question. That is a
16 different question. That's different. That
17 doesn't seem to go to the objection. It doesn't
18 even go to what I thought was another question
19 coming down the pike.

20 MR. POMERANTZ: I agree with Your
21 Honor.

22 MR. JOSEPH: Actually, that was where I
23 was heading, so I may have some more questions. I
24 will have to weigh them against the objection but
25 that was where I was heading at this point.

1 JUDGE STRICKLER: If that was the
2 question, is your objection withdrawn as to that
3 question?

4 MR. POMERANTZ: Correct. Yes, it is.

5 CHIEF JUDGE BARNETT: Okay. Ask that
6 question then, Mr. Joseph.

7 BY MR. JOSEPH:

8 Q. In Paragraph 206 of his written
9 rebuttal testimony, Professor Rubinfeld says that
10 if it turns out there are distinct segments of the
11 market for which the rates set by the judges, and
12 that's paraphrasing, he said this default rate
13 which is the rate set by the judges is too high, it
14 will be in the interest of both the services and
15 the labels to negotiate a direct deal.

16 Do you agree?

17 A. No, I don't. I mean, this is actually
18 an error that I think Dr. Rubinfeld makes in a few
19 places, where he basically says, don't worry if the
20 rate is too high, the market will take care of it,
21 and I think the economics of that are against him,
22 because as you heard earlier from me and so I won't
23 go over it again, and also from Dr. Shapiro and I
24 think Professor Lichtman as well, and we will see
25 actually from SoundExchange witnesses, we have got

1 the shadow pulling rates up so we can't assume
2 that, oh, yes, we will just -- in the shadow of the
3 statute, we'll just bargain down.

4 We have got the focal point effects and
5 the precedential effects and the change in the
6 threat points, all those things going up, and then
7 also we are bargaining situations of so-called
8 private information where even if it were the case
9 that it actually could be in the interest of both
10 the record company and simulcaster to negotiate a
11 lower rate, they may not get there because
12 bargaining does not always work perfectly.

13 The two sides have strategic incentives
14 to try to get the best deal for themselves and
15 sometimes those strategic incentives get in the way
16 of actually getting the deal, even though it would
17 be good for them, so what Professor Rubinfeld has
18 done, is essentially said, let's assume that
19 bargaining works perfectly, and let's assume that
20 there is no effect in the statutory shadow, and I
21 think you've heard quite a bit saying that those
22 are just not valid assumptions.

23 JUDGE STRICKLER: But don't Professor
24 Shapiro and also Professor Fischel and Lichtman all
25 argue that the reason why we see the --

1 respectively, the Pandora-Merlin agreement and the
2 iHeart-Warner agreement is because they are below
3 the statutory rates in one case, the Settlement Act
4 rate for iHeart-Warner, the Webcaster Settlement
5 Act for the NAB rate, and the other case below the
6 Pureplay rate, it is because they argue the
7 statutory rate from Web III or IV, in the
8 settlements anyway, were too high, and that's why
9 we had negotiations and agreements at levels that
10 were below? That is -- below those settlement
11 rates which were the default rates.

12 So that sounds like it is some sort of
13 hard way that I can't fully comprehend at the
14 moment consistent with what Professor Rubinfeld is
15 saying that Professor Rubinfeld is saying, oh, if
16 it's too high, you will be able to bargain for a
17 lower one. He doesn't also say that with regard to
18 those agreements, but I am finding it odd at the
19 moment.

20 THE WITNESS: But the one thing I think
21 though, I believe you've also heard through
22 Professor Rubinfeld, oh, look, you just don't see
23 very many of those and they shouldn't count, and
24 I'm staying out of that issue, but we get into the
25 question of why don't we see very many agreements

1 that are below the statutory rate, and I believe
2 what Professor Rubinfeld would say is, oh, because
3 everything is just fine and so we shouldn't expect
4 to see very many that are coming in below and then
5 the alternative interpretation is, well, no, the
6 rate and I think for other reasons I think the rate
7 is too high, we don't see it because there are all
8 these bargaining positions and there is the problem
9 of the statute. So you could ask the question, for
10 example, why don't we see Pandora having agreements
11 with the majors.

12 JUDGE STRICKLER: Isn't one of the
13 problems that people have to act in real time and
14 economics behavior has to occur with people, the
15 old joke about the two economists walking down the
16 street and one of them sees a \$20 bill on the
17 ground and goes to pick it up, and the other one
18 says, don't bother, it can't be real. Why can't it
19 be real? Because if it was real, somebody would
20 have picked it up already.

21 That's the problem. Somebody has to
22 begin the process, so I understand the argument
23 from Pandora and iHeart here is that the process
24 has begun here in Web IV that didn't exist in Web
25 III. It doesn't mean it's unrealistic. It just

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1 means this is what happens to be happening now. Is
2 that what is going on?

3 THE WITNESS: Well, I mean certainly I
4 think it's their position, they said, well,
5 competition has started to break out finally and we
6 are seeing some of it, but there is still a
7 question of why aren't we seeing more.

8 In a sense, take your \$20 bill joke, I
9 think that in a way applies to what Professor
10 Rubinfeld is saying because he is saying, well,
11 look, if the rate were too high, then we would have
12 seen all these other deals so the fact that we
13 don't, allows me to conclude the rate must be fine.

14 What I am saying is there is a lot of
15 economics that tells us we should be concerned that
16 there are obstacles to bargaining, and even if the
17 rate is too high, you wouldn't see these deals.

18 I am not saying the following. I
19 certainly want to be clear. I am not saying, oh,
20 if we don't see deals, that shows there must be a
21 problem. If the rate were set at exactly the right
22 level or too low, you wouldn't see deals. What I
23 am saying is I think it is a mistake and it's not
24 sound economics to say, oh, don't worry if the rate
25 is too high, everything will be taken care of,

1 because there are well-identified obstacles to
2 bargaining your way to efficiency, and in
3 particularly, the private information in all this
4 shadow.

5 JUDGE STRICKLER: Were there also
6 issues involving market power that would preclude
7 such agreements?

8 THE WITNESS: So there is -- we also
9 get to the question of whether the market for
10 licenses to noninteractive services, I have to get
11 the noninteractive, interactive right, to
12 noninteractive services whether that is fully
13 effectively competitive. That would be another
14 overlay on that.

15 JUDGE STRICKLER: Thank you.

16 BY MR. JOSEPH:

17 Q. Did Professor Talley have anything to
18 say about these points --

19 A. Yeah.

20 Q. -- that you have been discussing?

21 A. Yes. On Page 7 of my demonstratives
22 has two quotations from Professor Talley's written
23 rebuttal testimony, and the first one what he is
24 saying, if you look, he is talking about the
25 introduction of statutory rate, so this is a

1 quotation having to do with the -- what we have
2 been calling the shadow.

3 The part I'd direct you to, rather than
4 going through line by line, he says, well, the
5 introduction of statutory rates, so the shadow --
6 the statute says that the parties go exclusively to
7 non-consensual transactions, which is to say they
8 end up at the statutory rate, even if they would
9 have bargained for a lower rate, lower price in the
10 absence of a statutory rate.

11 My interpretation is that's Professor
12 Talley making the point that the shadow of the
13 statute can pull the rates up, so that you would
14 not see a rate negotiated below the statute in this
15 particular case that he is talking about. So I
16 think he is also agreeing that there is a shadow.

17 Now in the second quotation what he is
18 doing is talking about private information, so just
19 as I said, what we mean by that is if I am the
20 buyer, I know what I am really willing to pay or I
21 know that if I pay a particular price, how much I
22 choose to play, okay, but that may have been
23 something the seller doesn't know and certainly the
24 seller knows about opportunity cost is and its
25 willingness, so you have private information and

1 what he is saying here is it can reduce the set of
2 negotiated contracts which is to say in particular
3 you may fail to reach a negotiation because you
4 each have private information and you're going to
5 engage in strategic behavior to get yourself the
6 best deal and that can lead the whole thing to
7 break down.

8 Now you might say, wait a minute. I am
9 reading an awful lot in to just four lines, but
10 what I have done on the next page, because Dr.
11 Talley unpacks that for us. What I have done here
12 is this is a Yale Law Journal article that he
13 co-authored with Professor Ayers, it's cited in his
14 written rebuttal testimony, actually it's a
15 footnote either actually on the quotation I just
16 showed you or closely related to it and there, what
17 he is doing is explaining it in greater detail
18 where again, he is identifying private information,
19 how it functions as a transactions cost, and if you
20 go to after the ellipses, he is saying here again,
21 as a result of such strategic behavior, so each
22 side is trying to get the best deal for itself it
23 can, possibly concealing or strategically
24 misrepresenting its position. Again, nothing wrong
25 with that in the context of bargaining for both

1 sides to do it, but it can have the effect as he
2 says to fail to detect and exploit a mutually
3 beneficial trade, which is to say you may not reach
4 a deal even though it's otherwise in your
5 interests.

6 So he is making the same point I was
7 that there are these bargaining positions and why I
8 think it's not sound economics to think well, the
9 market will just take care of things.

10 Q. Let's change subjects, Professor Katz.

11 Do you recall the statement in
12 Paragraph 94 of your written direct testimony where
13 you said that there is a need to break from the
14 past?

15 A. Yes.

16 Q. Let's talk about the past, specifically
17 the Web III remand decision.

18 Do you recall the primary basis for the
19 statutory rate set by the Web III remand decision
20 with the Webcaster Settlement Act agreement between
21 SoundExchange and the NAB?

22 A. Yes.

23 Q. Why is there a need to break rates
24 based on that agreement?

25 A. My analysis, what I mean to conclude

1 that the rates they agreed to don't reflect the
2 rates that would be agreed to by a willing buyer
3 and a willing seller in the absence of the statute
4 in an effectively competitive marketplace.

5 Q. At a very high level, could you please
6 tell the judges why not?

7 A. Well, most fundamentally, because it
8 was in the shadows of Web II and III, and I never
9 can keep them straight, like the east and west, but
10 both shadows were there, and then also the fact
11 that SoundExchange, in my opinion, was a
12 monopolist. It was acting as a monopolist in that
13 situation.

14 Q. Let's start with the shadows. Can you
15 elaborate on how the shadows affected the
16 agreement?

17 A. There is the shadow of Web II because
18 it -- sorry I didn't know if you were objecting.

19 MR. POMERANTZ: No. Just shifting
20 position.

21 THE WITNESS: Trying to be a sensitive
22 witness.

23 You have the shadow of Web II which --
24 both directly in the first two years, they were
25 ultimately covered by the agreement were actually

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1 under the Web II rates so obviously, it affected
2 expectations of what would happen in the absence of
3 a deal, but also the way Web II had gone from the
4 perspective of NAB was quite unfavorable, the way
5 the noninteractive -- sorry, the way the
6 interactive benchmark was adopted, so they saw
7 under Web II, the prospects of paying quite high
8 rates and they were -- expected that that is what
9 would happen in Web III.

10 Then you also had the shadow going the
11 other way, that -- while you have this negotiation,
12 which would then get the broadcasters out of Web
13 III, SoundExchange would still be in Web III, so
14 SoundExchange, if you recall, I think you've heard
15 testimony, SoundExchange wanted and got the
16 agreement to be precedential that for
17 SoundExchange, saying, boy, we got a higher rate
18 from you, not only do we get more money from
19 broadcasters, well, that's going to help us when we
20 get into Web III, so that's the shadow you've heard
21 so much about.

22 Q. In your written direct testimony, you
23 talk about selection bias. What did you mean by
24 that?

25 A. If SoundExchange is going to have a say

1 in which agreements are precedential and which are
2 not, as a rational decisionmaker, it will chose to
3 have the ones that are precedential and the ones
4 that are favorable to it, so we are not getting a
5 random sample of agreements coming through.

6 Q. Now does it matter that Web II cast a
7 shadow on the NAB Webcaster Settlement Act
8 agreement?

9 A. Well, I think it does because I believe
10 that -- the analysis that -- underlying the Web II
11 decision, the interactive benchmark that was used
12 there, that was developed by Dr. Pelcovits, I think
13 resulted in prices that were too high so I think
14 given the record that was before the Web II judges,
15 they had to work with what they did, but I think
16 the result of that was rates that were unreasonably
17 high and then the problem is you then have the
18 shadow of Web II influencing what happened in the
19 Webcaster Settlement Act agreement.

20 JUDGE STRICKLER: In light of the fact
21 that the Web III rates also -- let me recap for a
22 moment, why does that shadow not exist here? Why
23 don't we see the same sort of settlements before
24 this Web IV proceeding given the existence of the
25 shadow from prior determinations?

1 THE WITNESS: So I don't know why it
2 is. I could speculate on some reasons why more
3 parties are participating this time than last time,
4 but I really don't know. I wasn't part of the
5 decision.

6 I guess I am one of the investments
7 they're making in it but I wasn't part of the
8 decision on whether or not to spend the money on
9 me, so it would just be speculating.

10 JUDGE STRICKLER: Thank you.

11 BY MR. JOSEPH:

12 Q. Now the other high level point you made
13 was monopoly. You say in Paragraph 68 of your
14 written direct testimony that SoundExchange
15 possessed monopoly power.

16 What led you to conclude that?

17 A. Well, they were in a position -- again,
18 apparently, it was legally granted to them, but
19 they were in a position of being able to represent
20 the entire industry and therefore serve as a
21 monopolist in representing the industry in this
22 negotiation.

23 Q. Professor Rubinfeld claims in Paragraph
24 220 of his written rebuttal testimony that you
25 didn't show that SoundExchange was acting as what

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1 he called a classic monopolist, and he notes that,
2 quote: "In reality, from his understanding,
3 SoundExchange was representing a multitude of
4 interests."

5 Does the fact that SoundExchange was
6 representing a multitude of interests mean that it
7 could not have exercised monopoly power?

8 A. So I am not quite sure what he means
9 when he says a classic monopolist. If he means
10 sort of a textbook monopolist, where the monopoly
11 is almost like a person. It wasn't that, but real
12 world monopolies, even if it is literally a
13 monopoly in a single firm, you've got lots of
14 different executives that can have different
15 opinions but in the end, it gets to act as a single
16 entity and so I just -- this thing about
17 representing a multitude of interests, I think
18 again is not sound economics.

19 Similarly, if what he wants me to do is
20 say, all right, it's not acting as a classic
21 monopolist, it's acting as a classic cartel, why I
22 would accept that, but it's the same thing, a
23 cartel can have a multiple of interests but it is
24 still a cartel and it's not competition, so I just
25 don't see the relevance of his saying it here,

1 given -- they had the legal right to represent
2 these different parties and that's what they were
3 doing.

4 Q. In Paragraph 226, Professor Rubinfeld
5 says that SoundExchange was not a monopolist
6 because, and I quote: "NAB could negotiate with
7 individual record companies."

8 Do you agree?

9 A. No. I just don't think -- they could
10 try to but it's a realistic alternative given that,
11 you know, I talk about these issues again of focal
12 points and given again that it is all legal, that
13 the majors were all on SoundExchange board and I
14 understand that they were on the bargaining
15 committee, so they were able to put forth a single
16 position, and it would be pretty obvious if you cut
17 a side deal, as another firm -- if you broke off
18 from that, so I think there is a lot of reasons
19 here, good economics, you'd expect full tacit
20 collusion.

21 And again, Mr. Pomerantz doesn't have
22 to stand up, I'm not making any accusations about
23 it being illegal, but there was a structure set up
24 that I think made it an unrealistic alternative to
25 think you would go and then bargain separately with

1 the majors.

2 JUDGE STRICKLER: Isn't there an
3 economic theory that suggests that cartels have
4 difficulty sticking together because there is
5 different demand facing different members of the
6 cartel, the cost structure of the market shares
7 that they have so you can split members of the
8 cartel off one from the other? In other words, you
9 can bargain with independents, or if you are seeing
10 some of that right now because a cartel can be
11 inherently unstable, if that is -- if you accept
12 that.

13 My question is: Doesn't
14 Dr. Rubinfeld's criticism, isn't it more
15 appropriate?

16 THE WITNESS: So look, I certainly
17 would take the point that cartels can be unstable.
18 We have also seen unfortunately numerous examples
19 of cartels that actually are quite successful and
20 last for many years until -- these are illegal
21 cartels. And so -- say we have amnesty programs.

22 Well, here, it is a legal structure
23 which effectively helps the stability quite a bit
24 because the members can communicate. There is
25 nothing wrong with that. Also, the reason you see

1 -- classically, you can see a cartel break down is
2 because you try and get one member to have a lot of
3 substitution for the others and say, wait a minute,
4 I'm going to break ranks and I'm going to get all
5 this stuff going to me and that's not something
6 that -- until very recently, we have seen it all,
7 and it is something that the industry has resisted.

8 In fact, it is something that
9 Dr. Rubinfeld himself actually has argued against,
10 because if I understand it correctly, his position
11 is that the majors are must-haves for
12 noninteractive services and so then you wouldn't be
13 able to break away and go get, say, oh, look,
14 undermine the cartel. We will bring all your
15 business to you but he is saying you can't do that
16 anyway.

17 JUDGE STRICKLER: So would you
18 characterize the independent or the direct
19 agreements between Pandora and Merlin and iHeart
20 and Warner and some of the other 27 or 28
21 agreements that we have seen as examples of
22 contracts that are undermining a cartel?

23 THE WITNESS: So I would want to be
24 careful about the language of the cartel. I am
25 saying, in a particular case, SoundExchange was

1 acting like a cartel. I don't, as I sit here and
2 understand, I don't want to say that the industry
3 today overall is acting as a cartel.

4 JUDGE STRICKLER: I don't mean by that
5 as an illegal cartel.

6 THE WITNESS: If you just mean, do I
7 think it's undermining classic coordination, do I
8 believe we have seen classic coordination in the
9 past, yes, it seems to me from what I understand in
10 the agreements, that that is what is starting to
11 happen.

12 JUDGE STRICKLER: Thank you.

13 BY MR. JOSEPH:

14 Q. In Paragraph 223 of his written
15 rebuttal testimony, Professor Rubinfeld also claims
16 that the fact that NAB and actually also SiriusXM
17 were able to negotiate discounts from the
18 prevailing statutory rates, the Web II rates, shows
19 that SoundExchange did not unilaterally dictate
20 rates and terms.

21 Do you agree that this shows
22 SoundExchange did not have monopoly power?

23 A. No, I don't. Let's be clear about two
24 things. One, my understanding is the discounts at
25 the front end came with higher prices at the back

1 end so it is not like saying a discount -- you'd
2 normally think and say, oh, I got a discount on my
3 car and I paid less for it.

4 They are saying they agreed to shift
5 the time pattern of the payments. Now it is the
6 case, though, there were some -- we call them
7 concessions, there were agreements as I understand
8 it, it was not the case that SoundExchange has said
9 here is the deal, here is every last term of it,
10 that's it. There was some back and forth.

11 None of that though undermines the
12 conclusion that they were monopolists. If you
13 think about the case I just mentioned, the case I
14 testified last year American Express. American
15 Express is found to have market power. American
16 Express engages in a lot of negotiations.
17 Microsoft, obviously, one of the most familiar
18 antitrust cases ever, they were found to have
19 market power. They bargain with their customers.
20 Bargaining with your customers and having some of
21 the give and take can even be a form of price
22 discrimination in a way to get additional monopoly
23 profits, so the mere fact that your customer asks
24 for something and you say, okay, I will give that
25 to you, particularly if that is going to help you

1 get more money, the fact that you do that doesn't
2 show you lack monopoly power. It shows you are
3 economically rational.

4 JUDGE STRICKLER: Is bargaining by a
5 monopolist also consistent with what Professor
6 Talley talked about, about trying to obtain private
7 information in order to price appropriately?

8 THE WITNESS: I don't remember --

9 JUDGE STRICKLER: I was obviously
10 referring to the comments that you had in your
11 demonstrative.

12 THE WITNESS: The private information
13 -- certainly, as part -- referring back to that, it
14 certainly is part of a real world bargaining
15 process. You would try to figure out what is it
16 you're -- what's really going on with the other
17 side of the bargain, and you may learn some things
18 through the give and take that may tell you some
19 things about the private information on the other
20 side, absolutely.

21 BY MR. JOSEPH:

22 Q. Professor Rubinfeld also claims that
23 the fact that NAB entered into the deal instead of
24 litigating or just taking the result of Web III in
25 his words, quote: "Suggests that they believe that

1 the rates reasonably represented the statutory
2 willing buyer/willing seller rate." That is in
3 Paragraph 227 of his testimony.

4 Does economics tell us whether that is
5 a rational conclusion for Professor Rubinfeld to
6 draw?

7 A. I think that is an unfounded
8 conclusion. I think what economics tells you is
9 that NAB and its negotiators and then the stations,
10 the broadcasters signing on to the agreement,
11 believed that that was better for them than the
12 alternative. They believed it was better than to
13 continue to pay the two years of the Web II rates
14 and it was better than what they expected to happen
15 in Web III, but that is a very different statement
16 than saying that they thought it was reasonable or
17 had met the statutory standard.

18 It just -- it meant that they concluded
19 it was in their economic self-interest to go with
20 the bargain instead of go with the status quo.

21 Q. Now in Paragraph 212 of his written
22 rebuttal testimony, Professor Rubinfeld states
23 that, quote: "He sees no sound basis for such a
24 dramatic departure from the CRB's rate setting
25 precedent," and where he says "such," he is

1 referring to the services's various proposals.

2 Do you agree with Professor Rubinfeld?

3 A. Well, as I talked about it, I disagree
4 with that because we talked about -- did I think we
5 learned from -- particularly when we are talking
6 about with simulcasting, that we learned from the
7 experience of terrestrial radio that it is
8 informative and it tells us that we would expect to
9 see an effectively competitive rate close to zero,
10 and I think far below what we have seen in the
11 statutory rates, and then as we've just been
12 talking, I think that there is some serious
13 problems with the Webcaster settlement agreement,
14 and that that is leading -- led to high rates and
15 so there is a need to break with it and then as
16 I've also testified earlier, I actually think
17 Dr. Rubinfeld's analysis properly construed and
18 corrected, says that there is a need to break.
19 That he hasn't made the case to stay with it.

20 Q. Professor Rubinfeld asserts in
21 Paragraph 214 that if it did not turn -- I'm sorry,
22 that if it did turn out that the statutory rate was
23 too high, private negotiations would take care of
24 the problem.

25 Do you agree with that as a general

1 proposition?

2 A. No, again, I mean, this is the point we
3 were talking about in a somewhat different context
4 specifically for simulcasting a few minutes ago.

5 I think it matters a lot whether or not
6 the judges get the right rate, and if it is too
7 high, I don't believe that the market will just
8 automatically take care of itself.

9 I think that will be a good thing given
10 on how much effort everyone has put into this
11 proceeding.

12 MR. JOSEPH: Thank you, Professor Katz.
13 Thank you, Your Honors. I have no further
14 questions.

15 CHIEF JUDGE BARNETT: Thank you.
16 Morning recess for 15 minutes.

17 (A short recess was taken.)

18 CHIEF JUDGE BARNETT: Please be seated.

19 JUDGE STRICKLER: These book titles
20 drive me crazy. Direct, cross.

21 MR. POMERANTZ: We were just talking
22 about that. Cross, redirect, recross.

23 CHIEF JUDGE BARNETT: Oh, I forgot to
24 mention to the reporter my realtime is not working
25 so when you have a chance.

1 JUDGE STRICKLER: Before you begin, I
2 wanted to follow up on some of the direct
3 examination briefly.

4 One of the concerns I had when I was
5 reading your testimony and I kept making notes as I
6 was going through, you kept repeating an
7 appropriate point and by way of example in
8 Paragraph 18 of your written direct testimony, you
9 say that "an effective competition standard
10 resolves the indeterminacy identified above that we
11 talked about and it does so by identifying prices
12 near marginal or incremental costs as the
13 appropriate level. That's sort of standard
14 microeconomic theory, but every time I saw that I
15 had a note to myself or in the margin saying has he
16 considered the fixed-cost issue or the fixed-cost
17 problem. And, again, in basic private goods,
18 microeconomic theory, fixed costs or sunk costs you
19 don't worry about them. You've got a rising
20 marginal cost curve, so fixed costs are going to
21 get covered to the extent they can, if demand is
22 appropriate.

23 But I kept looking, and then, finally,
24 I got to Paragraph 29 of your written direct
25 testimony on Page 20, and I wrote "finally." You

1 wrote: "The theoretical conditions of perfect
2 competition often are not satisfied in actual
3 markets. In particular, the presence of economies
4 of scale, marginal costs will be below average
5 costs. So the pricing of all of its products at
6 marginal costs causes a supplier to incur losses."

7 I thought, okay, now we've got it
8 addressed, and the way you addressed it, and
9 appropriately so, was by making reference to
10 product differentiation and that by differentiating
11 a product, a company -- a supplier can create, if
12 you will, sort of an island of limited market power
13 or Chamberlain, like, differentiated monopolist
14 competition and make profit with prices above its
15 marginal costs.

16 The problem I have is this, and maybe
17 you can help me out. Product differentiation will
18 allow a price to go above marginal costs to the
19 extent there's a demand for the differentiation and
20 it operates on the demand side of the market. So
21 whether or not product differentiation is
22 sufficient to cover fixed costs is really just a
23 matter of good fortune and allows the -- would
24 allow a market with declining long-run costs to
25 survive because if there's not enough profit in the

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1 differentiation it doesn't cover fixed costs. And
2 in this particular market, with intellectual
3 property, some costs are different, aren't they,
4 because we have recurring sunk costs?

5 That's a problem. It's not atypical.
6 Sunk costs build a large factory or a large plant
7 and then you hope you cover the costs constantly.
8 Companies have to constantly sink new costs in in
9 terms of artists and repertoire and recordings
10 costs and the like that are not necessarily
11 marginal but fixed.

12 How do we make certain that fixed costs
13 are covered and properly apportioned in the
14 noninteractive market, assuming that structure of
15 this market?

16 THE WITNESS: Okay. So I'll try to
17 address all the points you raised because you
18 raised several.

19 So, first, let me just start with --
20 and I will talk about fixed costs and the issue of
21 covering them, but do observe, I think, Professor
22 Shapiro brought it up in his testimony, and I
23 confess I can't remember whether it was his
24 rebuttal or his direct, given it started to merge.
25 But this question of whether the fixed costs -- in

1 fact, now it is a part that large for the record
2 companies. There's clearly the case that the
3 marginal costs are very low, so it's declining
4 average costs. I agree with that. But there is a
5 question whether, certainly, he raised about
6 whether the -- some absolute sense the costs are so
7 high because the costs of recordings have gone down
8 due to technological change and distribution is
9 different.

10 But holding that aside, that I just
11 want to just for the record note that I did observe
12 that he raised issues about how large they are. If
13 they are there, I agree that they have a viable
14 industry. They're going to have to be covered, and
15 I mentioned some of this also a few paragraphs
16 later in my report. In thinking about record
17 companies, and we do need to think about that
18 they're making money from noninteractive but also
19 from interactive streaming and then from download
20 sales and CDs. So you have to look at all of those
21 sources.

22 And -- but, ultimately, I mean, what we
23 generally do in the U.S. economy, and this includes
24 industries with very large fixed costs particularly
25 like an operating system is we rely on the

1 competitive outcome and, you know, firms -- if the
2 firms can't cover it, they end up failing. But
3 that firms that can successfully offer the product
4 that is differentiated, we have. And you're right,
5 it doesn't come out as sort of the perfect outcome
6 that the omniscient planner would get, but we've
7 made the judgment as a society and I think it's a
8 judgment economists generally support that this is
9 the best we can do and we rely on market forces
10 because if we try to second-guess them, it's not
11 going to work.

12 JUDGE STRICKLER: I understand and
13 agree with that point.

14 We also have a statute to deal with.
15 And as we discussed before, we tried to deconstruct
16 what Professor Talley criticized and he quoted the
17 statute. We have a statute that talks about our
18 concern about preserving the revenue streams of the
19 record companies. And as you just pointed out, the
20 way it would work with an operating system if the
21 demand is such, that even with whatever
22 differentiation you can do with regard to the
23 product, you can't cover your cost, it fails, it
24 goes out of business or it retrenches
25 significantly.

1 Given the statute, we may be in a
2 position where we have to be certain that, first of
3 all, obviously, that doesn't happen or that a level
4 of retrenchment itself might not be appropriate.

5 How, if at all, should the
6 noninteractive market cover its, for lack of a
7 better phrase, fair share of these fixed costs?
8 Why should it fall only to downloads, CDs and
9 interactive services to bear a portion of the fixed
10 costs?

11 THE WITNESS: Well, see, that's where I
12 think the effective competition standard helps us
13 because -- and, again, fair -- and economists do
14 talk about fairness even though they're fond of
15 saying they don't. But one view of what fairness
16 is, is we see what the effect -- what allocation of
17 fixed costs, if you want to put it that way, would
18 emerge from in effect a competition?

19 And, obviously, I'll state -- I will
20 state obvious things. One is it's up to you and
21 your colleagues to make the decision and it's not
22 my position to offer a legal opinion, but I would
23 say as an economist I disagree with the
24 interpretation of the statute as saying that it --
25 your obligation to preserve the revenues of the

1 record industry; but, instead, I interpret it, the
2 second clause, to say take it into account --
3 sorry -- I guess clause one about the substitution
4 and promotion and that's something that would be
5 taken into account in an effectively competitive
6 market, that if a record company was selling a
7 license and said, wait a minute, by selling this
8 license we're going to lose a ton of profitable
9 sales somewhere else, it would take that into
10 account and the effectively competitive price would
11 be higher. And I think that's the appropriate way
12 to think about it and I think that does -- you
13 know, in one sense of the word helps preserve
14 record industry revenues. It takes five times. It
15 takes them into account, but it's different, I
16 guess, than saying, well, there's some absolute
17 level they're guaranteed. Let them have -- and
18 that's how I as an economist, and not offering a
19 legal opinion, understand the statute to say let's
20 look at what comes out of effective competition,
21 how much they would bear.

22 Now, as I said, a record company
23 competing would have to take that into account and
24 I think the case we're talking about steering,
25 which you've heard a lot about, to the extent that

1 steering is limited by product differentiation,
2 that would then give them a greater ability to
3 cover their fixed costs, you know, charging a
4 higher price and that actually would give them
5 incentives to try to have more distinct music and
6 product differentiation.

7 So I think that that -- you know,
8 that's a reasonable way to do it and I think it's
9 one that's supported by economics. But, really, it
10 comes down to saying -- getting back to the
11 effectively competitive price will have built into
12 it some contribution margin, which will go towards
13 the overall costs, and that that's an appropriate
14 way to think about it, whatever falls out of that.

15 JUDGE STRICKLER: And if that
16 contribution isn't sufficient, it might, in certain
17 markets, in this particular market say
18 hypothetically cause a retrenchment in the amount
19 of resources devoted to the development of artists'
20 music and then effectively work with the
21 competitive market might have less music and less
22 sound recordings to be more specific than what
23 otherwise be the case because the overhead costs
24 and fixed costs simply can't all be recovered so
25 there has to be -- there might, which is

1 theoretical at a high level, people are saying
2 might be a situation where the supply in the market
3 for sound recordings would retrench.

4 THE WITNESS: So I would say that's
5 certainly an issue that the record companies have
6 raised and it's certainly, as an overall
7 theoretical possibility at some point, if
8 profitability falls low enough to stop investing.

9 Now, I want to point out on that, to
10 raise the issue, there is a big difference between
11 that and looking at industry revenues because of
12 the fact at least one economist has looked at
13 what's happened with the record industry and asked,
14 well, do we see evidence that its revenues have
15 fallen and the industry revenues have
16 contributed --

17 JUDGE STRICKLER: You're talking about
18 in this proceeding or somewhere else?

19 THE WITNESS: No. I'm saying that
20 you're asking about can these things happen, and I
21 don't believe it's in evidence in this proceeding.
22 Any found effect that the supply of music hadn't
23 fallen because you've got -- we've got a few
24 things. There's literature on some of this where
25 economists identified the following costs and also

1 identifying other revenue streams. And so, for
2 example, there's been a shift to charging more for
3 concerts as a way of supporting artists.

4 So one of the -- in response to your
5 question, one of the things can happen if you've
6 identified, possibly, retrenching. The other thing
7 is actually redoubling your efforts to seek other
8 revenue streams or engage, actually, in more
9 investments and innovation to try to figure
10 outweighs to increase revenues.

11 JUDGE STRICKLER: Do you -- I don't
12 know how I want to ask you this.

13 Asking these questions about fixed
14 costs and the need to cover recurring sunk costs,
15 do you see any evidence in this record, in this
16 proceeding that gives us data with regard to costs?
17 After all, we're not a public utility commission.
18 We're not setting reasonable rates of return.

19 Do you see any evidence that allows us
20 to, with any level of particularity, identify costs
21 and profits and any particular sunk costs?

22 THE WITNESS: And you're saying in
23 particular for the record, record companies?

24 JUDGE STRICKLER: In this proceedings.

25 THE WITNESS: So there is certainly --

1 there's pieces of evidence. I believe Professor
2 Shapiro was talking about a specific spreadsheet
3 and -- I mean, there are various pieces, but I
4 certainly don't -- as I sit it, I certainly don't
5 know enough to put together any sort of detailed
6 model of the record companies and their
7 profitability and what their costs. You know,
8 again, I've seen some of those numbers but not at
9 the level, assuming I could put together a model
10 and tell you this is what's going to happen and
11 here's what, you know, their -- here's what their
12 profits really are and here's how changing this
13 rate is going to affect overall.

14 JUDGE STRICKLER: Thank you.

15 MR. POMERANTZ: Your Honor, before I
16 start my cross-examination, if I can just inquire.
17 There were some briefs filed over a week ago
18 relating to Apple and whether we would be allowed
19 to ask questions of our witnesses who will be
20 coming in later this week. And it will be helpful
21 in our preparation -- they're not coming in today,
22 but it will be helpful in our preparation efforts
23 to know whether we're going to be allowed to ask
24 them questions relating to the Apple agreements.

25 CHIEF JUDGE BARNETT: We'll let you

1 know.

2 MR. POMERANTZ: Okay. Thank you.

3 CROSS-EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE

4 BY MR. POMERANTZ:

5 Q. Professor Katz, in your written direct
6 testimony, you propose a Zone of Reasonableness for
7 simulcasting rates, correct?

8 A. Well, actually, it's a little less
9 precise than that. I talk about, I think, you
10 know, a lower bound of Zone of Reasonableness and
11 then I talk about getting some insights into what
12 an upper bound would be, but -- so, as I say, a
13 little fuzzier than that, but broadly yes.

14 Q. Okay. And you say that the lower bound
15 of that zone is near zero, correct?

16 A. Yes.

17 Q. And you say that 13 percent of revenues
18 would be an unreasonably high number for the upper
19 bound, correct?

20 A. Yes, based on partly comparing it with
21 SDARS, yes.

22 Q. Okay. And so, in your view, the rate
23 for simulcasters should be set somewhere between
24 near zero and 13 percent of revenues, correct?

25 A. That's what I said about the Zone of

1 Reasonableness. Now, as you know, I did not offer
2 a specific statutory proposal and I have some --
3 now I have some concerns about how you would
4 measure the revenues; but yes, that's what I think
5 conceptually.

6 Q. All right. And so just to be clear,
7 you did not propose a specific rate within that
8 range, correct?

9 A. That's correct.

10 Q. Now, if you could turn to Page 52 of
11 your written direct testimony, Paragraph 80 -- and
12 I'm sorry. I have put a binder in front of you.
13 It's also in the binder that you have there, so
14 either one. But in my binder that I handed to you,
15 it's behind Tab 2.

16 A. Okay. I'll use this binder because
17 it's smaller.

18 Q. All right.

19 CHIEF JUDGE BARNETT: Paragraph number
20 again, and page?

21 MR. POMERANTZ: 80. Page 52, Paragraph
22 80.

23 CHIEF JUDGE BARNETT: Thank you.

24 And for the record, that is Exhibit
25 4000, which has been admitted?

1 MR. POMERANTZ: Yes, Your Honor.

2 BY MR. POMERANTZ:

3 Q. And in the last sentence of Paragraph
4 80, you state: "Given the information currently
5 available to me, I cannot determine an exact value
6 of the upper end of the Zone of Reasonableness, but
7 I expect to be able to make a more precise
8 determination after reviewing evidence that is
9 introduced by other parties or otherwise obtained
10 in the discovery process."

11 Do you see that?

12 A. Yes, I do.

13 Q. And you understand that after you
14 submitted this direct testimony in October of 2014
15 and before you submitted your rebuttal testimony at
16 the end of February of 2015 a lot of marketplace
17 agreements were exchanged by the parties in the
18 discovery process?

19 You're aware of that, correct?

20 A. Yes, I am.

21 Q. And you're aware that those agreements
22 involved both independent record labels and major
23 record labels, correct?

24 A. Yes.

25 Q. And you're aware that there were dozens

1 of agreements produced that related to interactive
2 services, correct?

3 A. Whether the -- I don't recall if the
4 agreements were all produced or not. It's
5 certainly in the aspects of the agreements were
6 introduced. I don't recall looking at -- oh, I
7 certainly looked at some -- I don't remember about
8 dozens, but yes, they were introduced.

9 Q. All right. And you're aware that
10 agreements between record labels and noninteractive
11 services such as iHeart, Pandora, and Apple were
12 also produced during the discovery process,
13 correct?

14 A. Yes, subject to there was some debate,
15 I guess, among some about Apple; but yes, I'm aware
16 of those being introduced.

17 Q. And you reviewed some of those
18 agreements between the time of your direct
19 testimony and your rebuttal testimony, correct?

20 A. That's correct.

21 Q. And your staff reviewed some of those
22 agreements, too, correct?

23 A. Yes.

24 Q. But after receiving those agreements
25 and reviewing those agreements, you did not amend

1 your written direct testimony to make a more
2 precise determination of the bounds of the Zone of
3 Reasonableness, correct?

4 A. That's correct.

5 Q. And you didn't do so in your rebuttal
6 testimony either, correct?

7 A. In terms of specifying a new zone,
8 that's correct. I think -- certainly, information
9 in my rebuttal testimony that I think is relevant
10 to the issue, but I did not propose a refined Zone
11 of Reasonableness.

12 Q. Now, you understand that NAB had --
13 (Interruption.)

14 BY MR. POMERANTZ:

15 Q. Professor Katz, you understand that the
16 NAB has proposed a specific rate of .0005 in this
17 matter, correct?

18 A. Yes.

19 Q. Can you identify a single marketplace
20 agreement in which any record company has agreed to
21 a per-play rate of .0005?

22 A. If I'm recalling correctly, and it's
23 not something I have offered, I believe that that's
24 what iHeart's experts have testified that Warner
25 agreed to with iHeart.

1 Q. Well, the .0005 rate is not set forth
2 anywhere in the iHeart-Warner agreement, correct?

3 A. And if you're asking me the question
4 does that number appear in print, my understanding
5 is it doesn't. If you're asking a question do --
6 how people testified that they believe that that is
7 the effective rate of the contract, my
8 understanding is that's what they testified to
9 unless you correct my memory.

10 Q. Are you aware of any internal document
11 at iHeart or at Warner that sets forth the .0005
12 rate?

13 A. I'm not aware of documents. There
14 could be. I haven't reviewed their internal
15 documents on that issue.

16 Q. And what you're testifying to is what I
17 think Professor Fischel referred to as his
18 incremental rate analysis, correct?

19 A. I'm not testifying to his analysis.
20 It's what I've identified -- I have identified that
21 they said that number. If that's what he's calling
22 his incremental rate analysis, then that's what it
23 is.

24 Q. So putting aside what you recall seeing
25 from Professor Fischel regarding the iHeart-Warner

1 deal, have you seen any other marketplace agreement
2 in which any record company has agreed to a
3 per-play rate of .0005?

4 A. No.

5 Q. Can you identify a single marketplace
6 agreement other than the iHeart-Warner one,
7 according to Professor Fischel, in which any record
8 company has agreed to a per-play rate anywhere
9 close to .0005?

10 A. We're going to get into the definition
11 of "close," but if you mean within, like, you know,
12 0007, no.

13 Q. 8?

14 A. No.

15 So I can't remember --

16 Q. 9, 10?

17 A. Well, that's the question. I can't
18 remember when Pandora numbers start kicking in.

19 Q. Okay. But, as you sit here today, you
20 can't think of any marketplace agreement in which
21 any record company has agreed to a per-play rate
22 double .0005, can you?

23 A. That's correct.

24 Q. If you could turn to Page 62 of your
25 written rebuttal testimony, Paragraph 95. This is

1 your conclusion about the Zone of Reasonableness,
2 correct?

3 A. Yes.

4 Q. And, in particular, you're offering
5 this Zone of Reasonableness for simulcasting,
6 correct?

7 A. Yes.

8 Q. So let's turn to what you mean by the
9 term "simulcast." You would agree that a
10 transmission is a simulcast if the Internet
11 transmission is exactly the same content as what is
12 played on the terrestrial radio station, correct?

13 A. Yes.

14 Q. So if it has the same music and the
15 same DJs and the same advertisements, that's a
16 simulcast, correct?

17 A. Yes.

18 Q. And you would agree that if the
19 Internet transmission swapped out all of the music
20 and all of the DJs, that that would not be a
21 simulcast, correct?

22 A. Yeah, that's certainly not how I was
23 thinking of it as a simulcast when writing my
24 report, yes.

25 JUDGE FEDER: Excuse me, Counsel.

1 We're talking about Paragraph 95 in the
2 written direct testimony?

3 MR. POMERANTZ: Correct. Correct.

4 JUDGE FEDER: You had said written
5 rebuttal.

6 MR. POMERANTZ: Oh, did I?

7 I am sorry. Yes, written direct. I
8 apologize. Page 52 of the written direct
9 testimony. My apologies.

10 BY MR. POMERANTZ:

11 Q. Is that where you were looking at?

12 A. Yes, it was.

13 MR. POMERANTZ: Thank you, Your Honor.

14 BY MR. POMERANTZ:

15 Q. So what we know is that if it's exactly
16 the same programming on the simulcast as
17 terrestrial, you view that as a simulcast. But if
18 you swap out all of the music and all of the DJs,
19 that is not a simulcast, correct?

20 A. Yes.

21 Q. By the time you submitted your direct
22 and your rebuttal testimony, you hadn't thought
23 about where between these two examples you would
24 draw the line between a simulcast and a
25 non-simulcast transmission, correct?

1 A. If you mean that as a -- drawing a
2 bright dividing line, that's correct. I mean, I
3 certainly had something in mind about simulcasting,
4 but I did not engage in a line-drawing exercise.

5 Q. Well, you said in your deposition that
6 you hadn't even thought about where to draw that
7 line, correct?

8 A. As I say -- just said, I did not engage
9 in a line-drawing exercise, that's correct.

10 Q. Even though you were proposing a Zone
11 of Reasonableness that applied only to something
12 called "simulcasting," correct?

13 A. Correct.

14 Q. Now, you were aware that technology
15 exists that allows a simulcaster to change the
16 music or the advertisements from a terrestrial
17 broadcast when it's transmitted via the Internet,
18 correct?

19 A. That's my understanding, yes.

20 Q. And you, yourself, have not proposed
21 any particular definition of simulcast in your
22 testimony, correct?

23 A. That's correct, I have not proposed a
24 definition to the judges.

25 Q. But you were aware that NAB has

1 proposed a definition of simulcast, correct?

2 A. I am now, yes.

3 Q. All right. So if you turn to Tab 6 in
4 the binder I handed to you, and if you look at the
5 first page of Tab 6, which is SX 283001.

6 MR. POMERANTZ: I actually think this
7 is not in evidence yet. I'm not sure if it
8 formally has to be in evidence, but I will offer it
9 into evidence at this point.

10 MR. JOSEPH: No objection.

11 CHIEF JUDGE BARNETT: 283 is admitted.

12 (SoundExchange Exhibit No. 283 was
13 admitted into evidence.)

14 BY MR. POMERANTZ:

15 Q. You understand that this document is
16 NAB's proposed rates and terms for this proceeding?

17 A. Yes, that is my understanding now.

18 Q. All right. And if you turn to the
19 second page and in the middle of the page there is
20 a paragraph that begins "broadcast
21 retransmissions."

22 Do you see that?

23 A. Yes, I do.

24 Q. Do you understand that to be NAB's
25 proposed definition of what a simulcaster is?

1 A. You'll need to give me a minute to look
2 at it.

3 Yes, I recall -- with two
4 qualifications that came up when you and I
5 discussed it in deposition. If you're saying that
6 broadcast retransmission is a synonym for
7 simulcast, which I would expect it to be, then yes.
8 And then subject to the question of whether there
9 are other parts of the document that either provide
10 context or elaborate on this, but this is defining
11 at least in part what it means to be a broadcast
12 retransmission.

13 Q. And, therefore -- and that's what you
14 loosely refer to as a simulcast, correct?

15 A. Yeah, I believe it's talking about the
16 same thing.

17 Q. Okay. And you see in this definition
18 there's four subparts in the latter half of the
19 definition, including what I'm going to direct you
20 to, Subpart 4.

21 Do you see that?

22 A. Yes, I do.

23 Q. All right. And NAB is proposing that a
24 broadcast retransmission include occasional
25 substitution of other programing that does not

1 change the character of the content of the
2 transmission.

3 Do you see that?

4 A. Yes, I do.

5 Q. You do not have an opinion as to what
6 the phrase "occasional substitution of other
7 programming" means, correct?

8 A. I certainly don't have a precise
9 numerical opinion. I may have a view that it would
10 mean less than half and, you know, some qualitative
11 view, but I do not have a numerical view.

12 Q. Well, you don't have a view as to
13 whether "occasional" means something closer to 49
14 percent or 1 percent, correct?

15 A. That's correct.

16 Q. And if we look at the phrase at the end
17 of that definition, that Clause 4, which says, "the
18 character of the content of the transmission," you
19 haven't offered an opinion about what that phrase
20 means, correct?

21 A. That's correct.

22 Q. And so it's fair to say that while you
23 offer a Zone of Reasonableness for something called
24 "simulcasting," you do not offer a definition of
25 what qualifies as a simulcast, correct?

1 A. And if you're asking have I put --
2 stated a definition of simulcasting, no, I have not
3 stated one.

4 Q. All right. Now, you also have not
5 proposed different rates for simulcasters versus
6 custom Webcasters like Pandora or others, correct?

7 A. I have not made a specific rate
8 proposal for anyone.

9 Q. All right. And you understand that
10 Professor Shapiro has not testified that
11 simulcasters should be paid at a different rate
12 than nonsimulcasters such as Pandora, correct?

13 A. I'm not sure that is correct, actually.
14 I have thought, maybe I'm wrong, that Professor
15 Shapiro, for example, thought that it would be
16 appropriate to have a music adjustment or a content
17 adjustment for simulcasters, but I may be
18 misremembering, but -- so as I sit here, I'm
19 certainly not prepared to testify that he thinks
20 there should be no difference.

21 Q. Well, you -- you're aware that
22 Professor Shapiro offered a rate proposal in this
23 case, correct?

24 A. Yes. I believe he offered a multi-part
25 rate proposal.

1 Q. He made a distinction between
2 ad-supported services and subscription services,
3 correct?

4 A. I think that's correct. I haven't
5 looked at it recently, but that's my recollection.

6 Q. But his rate proposal makes no
7 difference -- no -- doesn't make any distinction
8 between simulcasters and nonsimulcasters, correct?

9 A. Again, the part I'm having difficulty
10 is I don't recall whether or not he talked about
11 having an adjustment for the difference in
12 non-music contents or not.

13 Q. And you're not aware of Professor
14 Fischel or Professor Lichtman offering a proposed
15 different rate for simulcasters than
16 nonsimulcasters, correct?

17 A. I don't recall, as I sit here, what
18 their specific proposal was.

19 Q. And you're not aware of Professor
20 Rubinfeld offering a different rate for
21 simulcasters versus nonsimulcasters?

22 A. That one, I'm quite sure about. He did
23 not.

24 Q. Now, if a lower rate applied to
25 simulcasters than to nonsimulcasters, that might

1 create certain incentives and disincentives for
2 simulcasters, correct?

3 A. In theory, yes.

4 Q. If innovating the simulcast service
5 would result in having to pay a higher rate, an
6 economically rational simulcaster would take that
7 higher rate into account before deciding whether to
8 innovate, correct?

9 A. If such an innovation existed, if you
10 were rational, you would take that into account,
11 yes.

12 Q. Now, you conclude that the lower bound
13 of the Zone of Reasonableness for a statutory rate
14 for Webcasting -- sorry, for simulcasting is near
15 zero, correct?

16 A. Correct.

17 Q. And you reach this conclusion based on
18 your analysis of terrestrial radio stations,
19 correct?

20 A. I see that's the primary basis, yes.

21 Q. And your belief that simulcasts are
22 largely the same as terrestrial radio broadcasts,
23 correct?

24 A. Based on my review of the record, yes.

25 Q. Now, terrestrial radio stations have

1 the right to play recordings without getting the
2 permission from the owner of those recordings,
3 correct?

4 A. That's my understanding from music
5 recordings. I don't know if that's true generally,
6 but...

7 Q. And that's because the copyright laws
8 have not created a public performance rate when
9 recordings are played on terrestrial radio
10 stations, correct?

11 A. That's my understanding.

12 Q. And so radio stations can play the
13 recordings for free, correct?

14 A. Yes, that's actually one of -- that
15 assumption or understanding is part of my
16 testimony, yes.

17 Q. And so they don't need to negotiate
18 rates with record companies or with artists,
19 correct?

20 A. Correct.

21 Q. Now, under the willing buyer, willing
22 seller standard record companies are not willing
23 sellers to terrestrial radio stations, correct?

24 A. If you're asking me that -- about the
25 hypothetical negotiation over price, I certainly

1 would agree with that.

2 Q. And terrestrial radio stations are not
3 willing buyers under that standard either, correct?

4 A. I don't know. That seems like we're
5 getting in semantics because I'm sure the radio
6 stations are quite happy with the price of zero.
7 They're not holding out for a negative one. So we
8 could debate whether they're a willing buyer or
9 not.

10 Q. Assume the law was changed and
11 terrestrial radio stations had to license public
12 performance rights from record companies. Okay?

13 A. Okay.

14 Q. Is it your view that in that situation
15 the record companies would actually pay the radio
16 stations rather than the radio stations paying the
17 record companies?

18 A. I think that if you -- let me add
19 something else. As part of this, do radio stations
20 have the right -- are they going to have the right
21 to steer if they want to?

22 Q. I'm just asking you the question. You
23 can make whatever assumptions you want.

24 A. If we move to a market where now
25 there's going to be a license and the radio

1 stations get to pick which licensing they take and
2 which not, my testimony is that it could be
3 negative in some cases for some stations because of
4 the promotional value we would have to see.

5 Q. Well, it's your testimony, isn't it,
6 that record companies would actually end up paying
7 the radio stations rather than radio stations
8 paying the record companies?

9 A. No. I believe my testimony is in some
10 cases for some songs and some stations, it could
11 end up being negative and they could pay them.
12 Now, there's also questions you're going to have to
13 get into about whether the market would really be
14 effectively competitive, and I believe my testimony
15 is that under the standards of effective
16 competition, that could happen in cases, but I
17 don't believe I said it would happen in all cases.
18 In fact, I'm quite sure I didn't say that because
19 my conclusion you shouldn't go with a negative
20 lower bounds for Zone of Reasonableness was based
21 on the fact that I didn't think it would always be
22 negative.

23 Q. Are you aware that the record companies
24 and artists have been lobbying Congress to pass a
25 law creating a terrestrial public performance right

1 for sound recordings?

2 A. Yes.

3 Q. And you're aware of the current
4 legislation called the "Fair Play Fair Pay Act of
5 2015" that is being supported by the record
6 industry that would create a public performance
7 rates for terrestrial radio stations?

8 A. Not -- I'm not aware of the name of any
9 specific piece of legislation. My answer is -- you
10 know, the answer I gave you the first time I'm
11 aware of sort of broad efforts, but I'm not aware
12 of the specifics in the specific legislation.

13 Q. And you're aware that record companies,
14 big and small, and artists have been lobbying
15 Congress for years and years to try to create a
16 public performance right for terrestrial radio
17 stations, correct?

18 A. I'm aware that they've been doing it
19 for multiple years. I don't know when it started
20 or when there were gaps, or anything like that.
21 But I know they've had a persistent effort.

22 Q. And you're aware that the terrestrial
23 radio stations have opposed that legislation,
24 correct?

25 A. I'm not sure if I know they have a

1 unified view or not, but it wouldn't surprise me.

2 Q. Well, you're here testifying at the
3 request of the National Association of
4 Broadcasters, correct?

5 A. That's correct.

6 Q. Are you aware that the National
7 Association of Broadcasters has issued a statement
8 saying that it strongly opposes the Fair Play Fair
9 Pay Act?

10 A. No.

11 Q. Let me ask you, if you could, to turn
12 to Tab 7 in your binder.

13 A. (Witness complies.)

14 Q. I'm sorry. If you could turn to Tab 8
15 in your binder.

16 A. (Witness complies.)

17 Q. You see that this is an NAB statement?

18 A. Seems to be.

19 Q. And if you could read the second
20 paragraph, the first line, and tell me whether that
21 refreshes your recollection that the NAB strongly
22 opposes the Fair Play Fair Pay Act.

23 MR. JOSEPH: Objection, Your Honor.

24 The witness hasn't testified that he doesn't recall
25 anything. He said he doesn't know of any such

1 thing.

2 CHIEF JUDGE BARNETT: Sustained.

3 BY MR. POMERANTZ:

4 Q. You're aware, Professor Katz, that the
5 broadcasters have opposed legislation creating a
6 public performance right for sound recordings when
7 used by terrestrial radio stations for years and
8 years, correct?

9 MR. JOSEPH: Objection. Asked and
10 answered.

11 CHIEF JUDGE BARNETT: I think it's a
12 different question.

13 THE WITNESS: No. I mean, I -- in
14 fact, I thought you had asked part of that. As I
15 said, I'm not sure what the position is of radio
16 broadcasters on this. I believe that some are
17 against, but I don't know if all of them are or
18 not. As I said, I mean, they may have heterogenous
19 views so I don't have an opinion on that.

20 BY MR. POMERANTZ:

21 Q. Well, as an economist, if the results
22 of a change in law to create a terrestrial public
23 performance right meant that the record companies
24 would actually pay the radio stations, do you think
25 record companies would be in favor of that change

1 in law and radio stations would be against that
2 change in law?

3 A. I just want to make sure because we've
4 been talking about actual legislation, which I
5 haven't seen and I don't know the clauses, but
6 you're just asking as a hypothetical example
7 because since I don't know what this legislation
8 is, for all I know it says that the radio
9 companies -- the radio broadcasters cannot respond
10 to price in making their choice of what music to
11 play, yet would have to pay a license fee which
12 would then create de facto monopolies for the
13 record companies, and then I would think a rational
14 broadcaster would be against that. But I don't
15 know what's in that legislation.

16 Now, if you want to ask me a
17 hypothetical question, then I can answer it. But
18 if you're asking me a question about the specific
19 legislation, I don't know about the legislation,
20 and, as an economist, I can't start answering
21 questions about it unless I know what the various
22 clauses are.

23 Q. Well, perhaps, my question wasn't
24 clear, because it in no way mentioned a particular
25 piece of legislation. So let me ask my question

1 again.

2 As an economist, if the result of a
3 change in law to create a terrestrial public
4 performance right meant that record companies would
5 pay radio stations rather than radio stations
6 paying record companies, do you think the record
7 companies would be in favor of that change in law
8 and the radio stations would be against it?

9 A. And in your hypothetical is all the
10 record companies would pay all radio stations?

11 Q. They would have to enter into a license
12 agreement, private marketplace agreements.

13 A. Wait. Now you're changing your
14 hypothetical. I -- you said a -- I thought a key
15 element of your hypothetical was the direction of
16 payment, and I'm asking --

17 Q. Let me make --

18 A. -- you to clarify the --

19 Q. I'll clarify.

20 A. -- whether it's everybody is paying. I
21 just need to know what the hypothetical is and then
22 I'm happy to answer.

23 Q. Fair. I'll try to be clear. I thought
24 I was clear.

25 Assume that there's a change in law

1 that creates a public performance right for sound
2 recordings when they are aired on terrestrial radio
3 stations. Assume further that that means that a
4 terrestrial radio station cannot use a recording
5 unless they negotiate a deal with whichever
6 copyright owner owns the recording. In that
7 situation, would you expect record companies to be
8 in favor of that change in law and radio stations
9 to be against it if we assume that in that
10 eventuality it actually would be the record
11 companies paying the radio stations?

12 A. In every case?

13 Q. No. In whatever cases you were
14 imagining before.

15 A. I wasn't imagining cases. It's your
16 hypothetical.

17 Q. No. You had said earlier in this
18 proceeding that you think there will be situations
19 where record companies would be paying radio
20 stations, correct?

21 A. I said, yes, there well could be such
22 situations. And, again, I said it in the
23 hypothetical market that had effective competition.
24 I think there is open questions about whether there
25 will be effective competition here. So you're

1 asking me a different question than the ones in
2 which I testified.

3 Q. So you want to --

4 A. But let me fill in your hypothetical.
5 If you're telling me in your hypothetical that
6 every single station would have to pay -- every
7 single play would pay the record companies, then I
8 would expect the -- and you're telling me there's
9 no other changes, then I would expect the recording
10 industry to be in favor of it. But there's a lot
11 built into your hypothetical that I don't agree
12 that has to do with the real world.

13 Q. All right. You're aware that listeners
14 have only a limited number of choices of
15 terrestrial radio stations in their particular
16 geographic location, correct?

17 A. Yes.

18 Q. In a particular geographic location,
19 there may be only one country music station, for
20 example, correct?

21 A. That's -- I guess it's possible. I
22 don't know if it's true or not, but it seems
23 possible.

24 Q. Or one jazz station, correct?

25 A. Seems like it's possible.

1 Q. And you're also aware that listeners of
2 simulcast stations can choose from thousands of
3 radio stations that are available across the
4 country or across the world, correct?

5 A. Correct.

6 Q. And you, yourself, listen to simulcast
7 radio stations, correct?

8 A. I have been known to, yes.

9 Q. And you live in the bay area, correct?

10 A. That's correct.

11 Q. But you listen to radio stations from
12 Texas, Los Angeles, France and Germany, correct?

13 A. I have, yes.

14 Q. Have you done any empirical analysis to
15 determine whether the far greater number of
16 stations that are available to simulcast users
17 affects the promotional effects of simulcast radio?

18 A. I have not conducted a quantitative
19 study, no.

20 Q. Have you done any empirical analysis of
21 the promotional effects of terrestrial radio
22 compared to the promotional effects of simulcast
23 radio?

24 A. I believe in my rebuttal testimony,
25 there's a -- I may be misremembering because it's

1 my rebuttal testimony, but there is -- there's a
2 discussion of the effects of simulcasting and its
3 role in helping consumers with music discovery. So
4 I think there is evidence I have cited as well as
5 the fact that the record industry executives, I
6 think in two cases, have testified that they found
7 simulcasting more promotional, and maybe that's
8 getting off your question, more promotional than
9 other forms of streaming. So there is other
10 evidence. But to your question have I conducted my
11 own empirical study, no.

12 Q. If you could turn to Slide 5 in the
13 demonstratives that Mr. Joseph went over with you
14 this morning.

15 A. (Witness complies.)

16 Q. And do you recall that Mr. Joseph asked
17 you some questions about diversionary promotion in
18 connection with this slide?

19 A. Yes.

20 Q. And you recall that one of the points
21 you made was that in the quote from the statute in
22 the box at the bottom of this page it uses the
23 singular copyright owner.

24 Do you see that?

25 A. Yes, I do.

1 Q. And you recall that you made a point of
2 pointing out that that was singular, correct?

3 A. Yes.

4 Q. In diversionary promotion, that means
5 that a sale made by one record company would be
6 taken away from another record company, correct?

7 A. That's my understanding of how he's
8 using the definition, yes.

9 Q. So the singular copyright owner in this
10 phrase, there's going to be one copyright owner who
11 gets an additional sale and another singular
12 copyright owner who loses a particular sale,
13 correct?

14 A. Yes.

15 Q. All right. Let's talk about SDARS II,
16 which you used to create the unreasonably high
17 upper bounds of your Zone of Reasonableness,
18 correct?

19 A. Yes.

20 Q. SDARS II -- the rate established
21 through the SDARS II proceeding was not a
22 negotiated market rate, correct?

23 A. I mean, if you mean, ultimately, the
24 actual SDARS rate, it was one that was -- yeah, set
25 by judges.

1 Q. All right. And you understand that the
2 SDARS II proceeding involved a statutory standard
3 that is different than the standard that applies in
4 this case?

5 A. Yeah, I'm aware that the statutory
6 language is different. My understanding was,
7 though, that the process by which the rate was
8 derived had some substantial overlap in the use of
9 market agreements, particularly interactive ones,
10 and then there were adjustments and there were
11 certainly some differences. But my understanding
12 is that the statutory language overall is
13 different, yes.

14 Q. Well, from an economic point of view,
15 do you think the words "reasonable rates and terms"
16 means the same thing as rates and terms that most
17 clearly represent the rates and terms that would
18 have been negotiated in the marketplace between a
19 willing buyer and a willing seller?

20 A. I am not offering an opinion as an
21 economist as to the equivalence of those or not.
22 My reliance on the SDARS rates was based on the use
23 by the Court of having the noninter -- interactive
24 benchmark and the way it was applied, and then that
25 the process and the considerations that were

1 discussed and used to derive at, that those were
2 similar. I'm not offering it based on my reading
3 of the statute.

4 Q. Before you decided to adopt the SDARS
5 II rate as your upper bound, you considered two
6 potential adjustments, correct?

7 A. You don't mean before temporally?
8 Could you re-ask the question?

9 Q. Sure. I'll word it differently.

10 A. I apologize. Something just threw me
11 when you asked it.

12 Q. Is it -- turn to Paragraph 87, Page 57
13 of your written direct testimony.

14 A. (Witness complies.)

15 JUDGE STRICKLER: Which page?

16 MR. POMERANTZ: Page 57, Paragraph 87.

17 BY MR. POMERANTZ:

18 Q. As part of your analysis of using SDARS
19 II as an upper bound for your Zone of
20 Reasonableness, you consider something you refer to
21 as a music listening adjustment, correct?

22 A. That's correct.

23 Q. And you also considered something that
24 you refer to as a music revenue adjustment,
25 correct?

1 A. That's correct.

2 Q. And after doing your analysis of those
3 two adjustments, you decided that you didn't need
4 to make any adjustments, correct?

5 A. Well, I'm not going to get into
6 semantics.

7 What I concluded is that the adjustment
8 factor you would use would be near one, and
9 therefore, making the adjustment wouldn't have an
10 effect; but, nonetheless, it was taking these
11 factors into account.

12 Q. All right. You did not make any
13 adjustment for the fact that SiriusXM relies on a
14 subscription model and simulcasters rely on an
15 ad-supported model, correct?

16 A. That's correct.

17 Q. And you did not make any adjustment for
18 the differences between the costs of SiriusXM and
19 the costs of simulcasters, correct?

20 A. I would say that is not an accurate
21 characterization. What I did in that regard was
22 actually rely on what the judges had done there
23 because the rate for SiriusXM is actually not this
24 rate but a higher one because there was the -- I'll
25 probably get it wrong -- the 801(b) factors.

1 Anyway, there were other factors taken into account
2 and there was an adjustment made in the SDARS
3 proceeding for infrastructure costs and I did not
4 import that adjustment over here. So, in doing so,
5 I did make an adjustment.

6 Q. All right. Well, we'll take a look at
7 where you actually got your 13 percent number from
8 in a second.

9 But the SDARS II panel noted that
10 Sirius had a preferential bargaining position
11 because of the name recognition and status as the
12 sole provider of satellite radio services, correct?

13 A. As I sit here, I don't recall that. If
14 you want to represent it...

15 Q. Yeah. Go to Tab 13, please, in your
16 binder.

17 A. (Witness complies.)

18 Q. This is the SDARS II decision which is
19 a decision you relied upon, correct?

20 A. I believe so, yes.

21 Q. All right. Now, if you could turn to
22 Page 23065, and on the very -- on the right-hand
23 column near the bottom there is a sentence that
24 begins "no single buyer."

25 Do you see that?

1 A. I'm sorry, 23065 right column?

2 Q. Near the bottom?

3 A. Near the bottom.

4 Q. Maybe 15 lines up there's a sentence
5 that begins "no single buyer or group of buyers."

6 Do you see that?

7 A. Is it all right if I write on your --
8 can I write on your copy?

9 Q. You sure can.

10 A. So I don't lose the small print.

11 Okay. I do see the word "no single
12 buyer."

13 Q. And it says: "No single buyer or group
14 of buyers in that market seems comparable to
15 SiriusXM in terms of its name recognition and
16 status as the sole provider of satellite radio
17 services; therefore, the judges believe that
18 SiriusXM likely would have been in a preferential
19 bargaining position to the interactive subscription
20 service providers and may have negotiated very
21 different rates as a result."

22 Do you see that?

23 A. Yes, I do.

24 Q. Simulcasters are not in the same
25 bargaining position as SiriusXM was in, correct?

1 A. I think that's probably -- well, it's
2 certainly correct as far as they're describing,
3 yes.

4 Q. There isn't a single simulcaster that
5 is the sole provider of simulcasting services,
6 correct?

7 A. That's correct.

8 Q. Or the sole provider of Webcasting
9 services, correct?

10 A. I agree with that.

11 Q. But you didn't make any adjustment
12 because of this difference in bargaining position,
13 did you?

14 A. I will point out that the bargaining
15 position he was talking about was referring to an
16 analysis by Dr. Ordoover. So no, I didn't make an
17 adjustment to Dr. Ordoover's analysis because in
18 this aspect of it, ultimately, it wasn't part of
19 the rate.

20 Q. All right. So could you turn to Page
21 56 of your written direct testimony, Paragraph 85?

22 A. (Witness complies.)

23 Yes?

24 Q. Now, in the middle of Paragraph 85,
25 you -- there's a sentence that states: "In SDARS

1 II, the judges found that 13 percent constitutes a
2 sensible upper bound on the Zone of Reasonableness
3 before adjusting to account for the Section 801(b)
4 factors."

5 Do you see that?

6 A. Yes, I do.

7 Q. And you understand that 13 percent to
8 be a reference to 13 percent of revenues, correct?

9 A. I believe so, yes.

10 Q. All right. And you're relying on that
11 particular 13 percent figure in your direct
12 testimony in this case, correct?

13 A. Yes, as a guidepost, I am.

14 Q. And you're saying that that is an
15 initial guidepost and you believe that the rates
16 set in this proceeding for simulcasters should be
17 less than that 13 percent of revenue, correct?

18 A. Yes. Well, yes, subject to -- yes.
19 Yes.

20 Q. Do you understand that in the SDARS II
21 decision the judges arrived at that 13 percent
22 figure by looking to what happened in SDARS I?

23 A. As I sit here, I was actually blanking
24 out. I thought it carried over from that and it
25 was from the underlying -- that, ultimately, there

1 was an underlying analysis of interactive services
2 benchmark that carried across, but I may be
3 misremembering as I sit here.

4 Q. Okay. So let's just look back at the
5 SDARS II decision. Go to Page 2 -- it's at Tab 13
6 and go to 23066.

7 A. (Witness complies.)

8 I'm there.

9 Q. And if you look at the bottom of the
10 first column, right above the Heading 4 at the
11 bottom, do you see Heading 4 at the bottom?

12 A. Yes.

13 Q. And two sentences above that it states:
14 "Lastly, the judges consider the prevailing
15 statutory rate of 8 percent, which the judges
16 adjusted down from a 13 percent rate in SDARS I,
17 based on the fourth Section 801(b) factor."

18 Do you see that?

19 A. Yes, I do.

20 Q. All right. So, do you have any reason
21 to disagree with the fact that the 13 percent
22 figure was simply something that the judges in
23 SDARS II took from the SDARS I decision?

24 A. I just want to make sure I understand
25 your question. Are you asking me did the SDARS II

1 judges just take the SDARS I decision without
2 considering it? They just imported it
3 mechanically, is that what you're asking? I don't
4 understand the question.

5 Q. You are relying on this 13 percent
6 figure in your testimony, correct?

7 A. I am relying on a 13 percent figure,
8 whether it's the one being discussed here I'm not
9 sure because it says about consider -- I mean, this
10 may be a different 13 percent. You're asking me
11 about one paragraph in a long document. I
12 certainly rely on a 13 percent figure they came up
13 with; but, as I sit here, I don't know if this
14 is -- I mean, one of them even as I thought one of
15 the judges had a different opinion as a result. So
16 just looking at this paragraph in isolation, I'm
17 not sure this is the 13 percent.

18 Q. So, where did you get your 13 percent
19 figure from?

20 A. I mean, I would have to go back and
21 look through it, but it seemed like there was an
22 overall discussion and where they came out, but I
23 don't remember if it's that line. I would have to
24 go back and read through SDARS.

25 Q. But as you're sitting here today, you

1 can't think of any other source for that 13 percent
2 figure other than what I just showed you here as a
3 direct reference to SDARS I?

4 A. Wait. I don't understand.

5 You're saying -- if you're asking do I
6 think the judges said, well, there's 13 percent in
7 SDARS I, we're not going to do any thinking, let's
8 just adopt it again without looking at the record,
9 I don't believe that's what they did.

10 Q. Well, I didn't say that's what they
11 did.

12 A. Well, that's what I'm saying, I don't
13 understand what question you're asking.

14 Q. My question is: Where did they come up
15 with the 13 percent figure that you're relying on
16 in your testimony?

17 A. I guess you go back and you can read
18 the decision or they explained it. I was talking
19 about the fact that they ultimately came up with
20 it, and then I thought that it -- as I believe I
21 wrote in my testimony, that it had been influenced
22 by an interactive service's benchmark.

23 Q. Well, do you under -- okay. Let's go
24 to SDARS I. You understand that there was also a
25 13 percent figure referred to in SDARS I, correct?

1 A. Certainly. Based on what I just read,
2 that would be my understanding.

3 Q. Okay. And is it your understanding
4 that the 13 percent figure that was referred to in
5 SDARS I was derived from an analysis of interactive
6 service agreements that were entered into before
7 2008?

8 A. I don't have a recollection, as I sit
9 here. I would have to go back and read through the
10 decision.

11 Q. Well, is it your view, as you sit here
12 today, that it's proper for the judges in this
13 proceeding to rely on a percentage that was derived
14 from interactive service agreements that were
15 entered into prior to 2008?

16 A. If there were intervening adjustments
17 made and considerations, yes.

18 Q. So you believe that it's okay to
19 consider interactive service agreements in setting
20 an upper bound for the Zone of Reasonableness?

21 A. I have said that I think that
22 interactive service agreements do have a role to
23 play in thinking about it, and I testified about
24 that extensively in my written rebuttal testimony,
25 as you know. And -- but would I have come out,

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1 both in terms of using the SDARS agreements and
2 also on the interactive service agreements
3 generally with Dr. Rubinfeld and said, well, it
4 provides some information, I have not been able to
5 use it to come up with a specific rate, and that's
6 why I didn't propose a specific rate here. And I
7 also, in identifying what I thought were numerous
8 significant errors, Dr. Rubinfeld did not
9 ultimately say here is the rate that comes out of
10 it, but I certainly have taken the position that
11 there is information to be gleaned from looking at
12 those. It's a question of how you use that
13 information.

14 Q. Do you believe that the judges in this
15 proceeding should be relying on agreements entered
16 into before 2008 to set an upper bound for the Zone
17 of Reasonableness?

18 A. If you're saying that there's
19 agreements from 2008 that were part of the overall
20 record developed as part of SDARS and that it
21 carried through into SDARS II, of course, subject
22 to the judges looking at the updated records, I
23 think they can have a role to play. If you're
24 asking me would I be comfortable if the present
25 judges said, oh, let's just look at agreements from

1 2008 and ignore the rest of the record and anything
2 that's happening in the intervening period, I would
3 not be comfortable with that.

4 Q. All right. Let's go to a different
5 subject.

6 Could you turn to Page 30 of your
7 written direct testimony?

8 A. (Witness complies.)

9 I'm there.

10 Q. All right. And you see in Heading 5
11 you state: "Dr. Pelcovits's Web II interactive
12 services benchmark was so seriously flawed as to be
13 unusable."

14 Do you see that?

15 A. Yes, I do.

16 Q. And then you go on for the next ten
17 pages, or so, and discuss those flaws, correct?

18 A. Yes. I won't check the number of
19 pages, but yes.

20 Q. Well, it's at least 10.

21 Let's go to Page 40. If you could turn
22 to Page 40.

23 A. (Witness complies.)

24 Q. And you see Heading 3 states:

25 "Dr. Pelcovits relied on what is very likely a bias

1 sample of contracts."

2 Do you see that?

3 A. Yes, I do.

4 Q. And by a bias sample you're saying that
5 he looked at only contracts between interactive
6 services and major record companies and did not
7 look at agreements between interactive services and
8 independent record companies, correct?

9 A. That was one of the points. I need to
10 check whether there are -- I can't recall if there
11 were other points I was making here about bias
12 because questions of bias samples have come up in
13 other contexts; but, certainly, that's one of the
14 points I was making.

15 Q. All right. So in the context of not
16 considering independents, you discuss this in
17 Paragraph 60 on the next page of Page 41 so I want
18 to direct your attention to Paragraph 60. And in
19 Paragraph 60, you state: "More generally, the
20 greater the buyer's ability to shift uses to or
21 from a seller with whom the buyer is negotiating,
22 the more competitive will be the resulting price.
23 Hence, negotiations between any given buyer and
24 small labels will tend to be closer to effectively
25 competitive rates than corresponding deals between

1 the buyer and a major record company because
2 significant share shift is more likely to be
3 possible with respect to the smaller labels."

4 Do you see that?

5 A. Yes, I do.

6 Q. What do you mean by the term
7 "significant share shift"?

8 A. I mean that the buyer could have an
9 intent -- greater ability as measured as a
10 percentage of the purchases of that particular
11 seller to substitute away from that seller and into
12 another or to substitute to that seller and away
13 from other sellers.

14 Q. And why do you think that significant
15 share --

16 (Interruption.)

17 BY MR. POMERANTZ:

18 Q. Again, we're at the last sentence of
19 Paragraph 60, Professor Katz.

20 Why do you think significant share
21 shift is more likely to be possible with respect to
22 the smaller labels?

23 A. Well, if you've got a large enough
24 label, at some point -- actually, not label, but if
25 you've got a large enough record company, at some

1 point trying to shift away from them entirely is
2 going to significantly degrade the buyer or
3 certainly it's quite possible significantly degrade
4 the quality of the buyer's product that it's, in
5 turn, offering to its customers.

6 Q. And why do you think that the
7 significant share shift would lead to the smaller
8 labels receiving a lower rate than the major record
9 companies?

10 A. Well, actually, I think what I said
11 here and what I've learned since is a little more
12 optimistic about competition than, perhaps, is
13 warranted because there actually is an issue of
14 whether the smaller labels will just piggyback on
15 the majors, and by doing that undermine this
16 competitive force. But if we hold that aside,
17 which is an important thing to hold aside, if they
18 weren't able to piggyback, the fact that they could
19 potentially, you know, could double their business
20 would make them -- they would seek greater
21 competitive benefits and so it would make them more
22 likely to break ranks with the rest of the
23 industry.

24 Q. All right. Let's turn to Page 43 of
25 your testimony.

1 JUDGE STRICKLER: Before you do, does
2 that mean the opposite would be true if we finished
3 off and rephrased the last phrase in Paragraph 60
4 of your written direct testimony, that significant
5 share shift is less likely to be possible with
6 respect to the larger labels?

7 THE WITNESS: Yeah. I mean, careful
8 about how we're measuring it, but you could have a
9 bigger absolute quantity of share shift just
10 because the record company is much bigger. But,
11 yeah, I think -- sure. I mean, just take a
12 mechanical point. You could have a small label
13 where you could triple your plays of that label.
14 You couldn't -- I mean, it would be hard pressed to
15 triple the place of Universal. I mean, the share
16 would be over a hundred percent. So, that level,
17 yes.

18 JUDGE STRICKLER: So, does that mean
19 you could affect the price, that is to say the rate
20 through steering with regard to the smaller labels
21 than the larger labels?

22 THE WITNESS: Potentially, yes. I
23 mean, they could do -- I mean, they would --

24 BY MR. POMERANTZ:

25 Q. Let me turn you now to Page 43, and

5777

1 this is where you begin your discussion of the
2 settlement agreement between NAB and SoundExchange,
3 correct?

4 A. Yes.

5 Q. And the heading here says: "The
6 NAB-SoundExchange WSA agreement is not a valid
7 benchmark."

8 Do you see that?

9 A. Yes, I do.

10 Q. At the time you wrote this, did you
11 think SoundExchange was going to be offering the
12 2009 settlement agreement as a benchmark in this
13 2015 proceeding?

14 A. I wasn't sure if they were or not.

15 Q. But that's why you wrote this heading,
16 right, because you thought SoundExchange was going
17 to be relying on it as a benchmark in this
18 proceeding?

19 A. No. I think it's also -- it's of
20 interest because I think the questions of the
21 shadow and the fact that it played an important
22 role in the past, I think it's worth understanding
23 because, as you know, I believe there's a need to
24 break with the past.

25 Q. And you understand that SoundExchange

1 is not offering the NAB-SoundExchange settlement
2 agreement as a benchmark in this proceeding?

3 A. Actually, I'm not sure I have an
4 understanding. My understanding is that your
5 economic experts or at least Dr. Rubinfeld is not
6 offering it. I don't know if there's something
7 else SoundExchange is doing. I haven't, for
8 example, read what various SoundExchange executives
9 are saying.

10 Q. And you understand that NAB and
11 SoundExchange entered into their settlement
12 discussions before the Web III proceeding had
13 concluded, correct?

14 A. Yes.

15 Q. In fact, you understand that NAB and
16 SoundExchange reached an agreement before the
17 direct cases in Web III had even been submitted,
18 correct?

19 A. That's my recollection.

20 Q. And, therefore, neither NAB nor
21 SoundExchange knew what rates would be set by the
22 CRB in Web III at the time they reached their
23 agreement, correct?

24 A. Exactly, yes.

25 Q. And both NAB and SoundExchange knew

1 that if they didn't reach a settlement, the
2 broadcasters could still use the recordings of the
3 labels by paying whatever rates were set by the CRB
4 in Web III, correct?

5 A. Yeah, exactly. That's the shadow.

6 Q. So NAB had a choice at the time it
7 entered into the settlement agreement, correct?

8 A. Yes.

9 Q. It could have set rates by reaching an
10 agreement with SoundExchange, or it could have not
11 reached an agreement with SoundExchange and just
12 relied on whatever rates were issued in the Web III
13 proceeding, correct?

14 A. Exactly. I think that's what I just
15 said in my direct testimony earlier this morning.

16 Q. And NAB could have participated in the
17 Web III proceeding if it wanted to, correct?

18 A. You're saying conditional on the
19 agreement or not. It depends on what you're --
20 yes.

21 Q. If they didn't reach an agreement --

22 A. If they didn't reach an agreement, my
23 understanding is they could have participated.

24 Q. They could have hired you to come in
25 and testify, correct?

1 A. I would have to see if I was busy then,
2 but potentially, yes.

3 Q. They could have made all of the
4 arguments they were making about interactive
5 service agreements today, they could have made them
6 back in Web III, correct?

7 A. I don't think that is correct. I think
8 we have a lot of new information today that wasn't
9 available then, so I don't believe they could make
10 the arguments. I mean, take the case of the
11 Universal-EMI merger about which the judges have
12 heard a lot, I think all of those documents -- I
13 don't think would have been available to them, I
14 believe. Anyway, they weren't available to the
15 Court then.

16 We've also seen, as you and I have
17 discussed a little bit earlier today, the -- you
18 know, the breaking out of competition in some of
19 the noninteractive direct deals now. So no, I
20 don't think you could. It's a different record
21 now, and that's one of the reasons why I think it's
22 appropriate to break with the past because it's now
23 a different record with a lot of information that,
24 I think, leads to a different decision. So I don't
25 see how you think they could have run Web IV at the

1 Web III time frame.

2 Q. Do you think the majors or must-haves
3 were streaming services back in 2009?

4 A. I --

5 MR. JOSEPH: Objection. Ambiguous.

6 CHIEF JUDGE BARNETT: Sustained.

7 JUDGE STRICKLER: Is the ambiguity
8 because the phrase "streaming services" is not
9 defined?

10 THE WITNESS: Yes, Your Honor. In the
11 question.

12 BY MR. POMERANTZ:

13 Q. All right. Let's talk about
14 interactive streaming services.

15 Do you think record companies -- do you
16 think the major record companies or must-haves were
17 interactive streaming services back in 2009?

18 A. I would have to look at the full set of
19 majors then because it was somewhat different than
20 now, and whether they all were I'm not sure, and I
21 haven't -- but I would believe, for example, that
22 Universal would have been as well, but I have not
23 gone back and conducted a detailed examination of
24 the status of things in 2009.

25 Q. And the NAB certainly was capable of

1 paying for lawyers to handle the Web III
2 proceeding, correct?

3 MR. JOSEPH: Objection. Calls for
4 speculation. Lack of personal knowledge.

5 CHIEF JUDGE BARNETT: Sustained.

6 BY MR. POMERANTZ:

7 Q. You don't have any idea of whether
8 the -- do you know what the NAB broadcasters
9 revenues were in 2009?

10 A. No. I believe in 2008 and 2009 that
11 they were depressed, but I don't -- because of the
12 great recession, at least that's my recollection.
13 But as I sit here, I don't have a view on revenues.
14 I do have a view as an economist that the revenue
15 probably would be the wrong measure if you were to
16 be allowed to ask a question about affordability
17 because you should look at what the profits were.

18 Q. Do you understand that the broadcasters
19 were bringing in more than \$10 billion in the
20 depressed years of 2008 and 2009?

21 A. And you're talking specifically about
22 radio broadcasters?

23 Q. Right.

24 Whoever are members of the NAB.

25 A. So if I recall figures that include

1 television, I believe it's bigger than that,
2 significantly.

3 Q. Now, in addition to deciding not to
4 reach an agreement and wait for the Web III
5 decision, the broadcasters also could have reached
6 out directly to the major record companies to try
7 to strike a direct deal, correct?

8 A. Well, as I testified earlier, if you
9 mean they could contact them and reach out, in
10 essence, sure.

11 Q. Are you aware of any evidence that any
12 broadcaster or the NAB reached out to the major
13 record companies to see if they could reach a
14 direct agreement with a major record company rather
15 than a settlement agreement with SoundExchange?

16 A. No. I believe Mr. Newberry might have
17 told me that, you know, they thought about it and
18 they just thought it wasn't -- there was no point
19 that they didn't believe the rates. Certainly as I
20 sit here, I'm not aware of any specific efforts to
21 try to contact him and reach side deals.

22 Q. Now, what you said was that Warner or
23 the majors sit on the licensing committee of the --
24 of SoundExchange, and therefore, they wouldn't go
25 ahead and do a direct deal, correct?

1 A. That's simplifying things a bit, but I
2 believe their ability to formulate an industry
3 position then would affect their overall incentives
4 and would increase the ability to engage in tacit
5 coordination, yes.

6 Q. And you're aware that when Warner
7 entered into the iHeart deal it held the same
8 position on the SoundExchange board and licensing
9 committee, correct?

10 A. No. I mean, Sound -- I -- when you say
11 correct, it's not my recollection because I'm not
12 aware of whether they were on it or not, and also
13 I'm not aware that they're engaged in a specific
14 negotiation now in the same way that they were.
15 And if you represent it, I don't have a reason to
16 disagree with you, but I just don't know what the
17 current structure is.

18 Q. Now, you say that you spoke with
19 Mr. Newberry in advance of submitting your written
20 direct testimony, correct?

21 A. Yes.

22 Q. And you understood that he was one of
23 the lead negotiators for the NAB in the discussions
24 that led to the settlement with SoundExchange,
25 correct?

1 A. That's my understanding, yes.

2 Q. And when you talked to Mr. Newberry,
3 you were seeking relevant information about the
4 negotiations of the terms of that settlement
5 agreement, correct?

6 A. Yeah.

7 Q. As part of your efforts to gather
8 relevant information about that settlement
9 agreement, did you read the press statement that
10 was issued by the NAB at the time that the
11 settlement agreement was announced?

12 A. I don't believe that I had read that
13 press statement at the time, but I'm not sure I
14 read it at that time or not, but I don't think I
15 did.

16 Q. Have you read it now?

17 A. I believe I have seen parts of it. I'm
18 not sure -- I don't recall if I read the whole
19 thing or not. Maybe you're talking about a
20 different press statement. I have, I believe, seen
21 part of a press statement.

22 Q. Are you aware that the executive
23 director of the NAB said back in 2009 that the
24 settlement agreement provided fair compensation to
25 artists and copyright owners?

1 A. I don't remember specific language.

2 But, again, if you want to represent that to me or
3 show it to me, I don't have a reason to doubt you.

4 Q. As part of your efforts to gather
5 relevant information about the settlement
6 agreement, did you review the motion that the NAB
7 and SoundExchange jointly filed with the CRB panel
8 seeking adoption of the settlement?

9 A. I don't believe that I reviewed that as
10 part of conducting the analysis that led to my
11 written direct testimony.

12 Q. Have you read it since that time?

13 A. Again, I believe I have read parts of
14 it. It may be referring to something different
15 than what I'm recollecting, but I have seen some
16 sort of -- parts of some sort of joint motion.

17 Q. Well, are you aware that back in 2009
18 NAB expressed a view that because the rate and
19 terms provided by the settlement had already been
20 embraced by over 380 commercial broadcasters
21 comprising thousands of individual stations in the
22 context of the Webcaster Settlement Act agreement,
23 the settlement manifestly provides a reasonable
24 basis for setting statutory terms and rates?

25 A. That language sounds familiar, but I

1 don't have it committed to memory.

2 Q. So, as part of your efforts to gather
3 relevant information about the settlement
4 agreement, did you seek out information about the
5 number of broadcasters that have taken out
6 Webcasting licenses at the rates set forth in the
7 NAB-SoundExchange settlement agreement?

8 A. I did not seek it out. I was aware
9 that many broadcasters had done it. I thought it
10 was in the order of hundreds, so I was aware of
11 that. But beyond that, I didn't seek additional
12 information.

13 Q. And you're aware that those hundreds of
14 broadcasters who had taken out licenses pursuant to
15 the settlement agreement between NAB and
16 SoundExchange were paying the rates set forth in
17 that settlement agreement, correct?

18 A. That's what I would assume they're
19 doing, yeah.

20 Q. Could you turn to Tab 4 in the binder.

21 A. (Witness complies.)

22 Q. This is the testimony, the written
23 testimony of Jonathan Bender of SoundExchange in
24 this matter. And if you could turn to Page 13...

25 A. (Witness complies.)

1 I'm there.

2 Q. All right. And you see that Mr. Bender
3 has Figure 2 which describes the licensees by type.

4 Do you see that?

5 A. Yes, I do.

6 Q. Is this -- and I want to direct your
7 attention specifically to the broadcaster line up
8 at the top of the chart.

9 Do you see that?

10 A. Yes.

11 Q. 678 licensees in 2011; 851 in 2012; and
12 949 in 2013.

13 Do you see that?

14 A. Yes, I do.

15 Q. Were you aware at the time that you
16 submitted your written direct testimony that there
17 were almost a thousand broadcasters who were paying
18 the rates set forth in the NAB-SoundExchange
19 settlement agreement?

20 A. As I said, I don't have a recollection
21 of thinking of a specific number. I thought it was
22 somewhere in the hundreds, and beyond that, I
23 didn't form a specific belief.

24 Q. Is it fair to say that no broadcaster
25 is legally compelled to simulcast?

1 A. Not that I'm aware of, but I wouldn't
2 offer a legal opinion on that. But not that I'm
3 aware of.

4 Q. But it's your understanding that
5 broadcasters choose whether to simulcast or not,
6 correct?

7 A. That's my understanding, yes.

8 Q. And it's your understanding that almost
9 a thousand broadcasters have decided that they want
10 to simulcast using the rates set forth in the
11 agreement between NAB and SoundExchange, correct?

12 MR. JOSEPH: Objection. I don't
13 believe he has testified to that understanding.

14 MR. POMERANTZ: That's my question to
15 him.

16 THE WITNESS: I'm sorry. I --

17 CHIEF JUDGE BARNETT: Would you repeat
18 the question, please.

19 MR. POMERANTZ: Sure.

20 BY MR. POMERANTZ:

21 Q. Is it your understanding that the
22 almost thousand broadcasters -- actually, I'll ask
23 a different question. I'll withdraw that question.

24 CHIEF JUDGE BARNETT: Okay.

25 BY MR. POMERANTZ:

1 Q. The almost thousand broadcasters that
2 have decided to simulcast and to pay the rates in
3 the NAB-SoundExchange settlement agreement are
4 doing so because they think doing so is in their
5 best interest, correct?

6 A. I would assume so, yes.

7 MR. POMERANTZ: I have no further
8 questions, Your Honor.

9 CHIEF JUDGE BARNETT: Mr. Joseph, how
10 much redirect?

11 MR. JOSEPH: Very little, Your Honor.
12 I would say -- in the past, I have said under two
13 minutes. This may be about that amount.

14 CHIEF JUDGE BARNETT: All right.

15 REDIRECT EXAMINATION BY COUNSEL FOR NAB

16 BY MR. JOSEPH:

17 Q. Professor Katz, let me ask you to turn,
18 please, to Paragraph 74 of your direct testimony.

19 A. (Witness complies.)

20 CHIEF JUDGE BARNETT: I'm sorry. Where
21 did you direct?

22 MR. JOSEPH: Paragraph 74 on Page 48.

23 CHIEF JUDGE BARNETT: Thank you.

24 BY MR. JOSEPH:

25 Q. Does that paragraph place where you

1 address the significance or meaning of the number
2 of broadcasters that have signed up under the
3 Webcaster Settlement Act rates?

4 A. I mean, it's certainly one place where
5 I did and that's the subject of the paragraph.

6 Q. And is that still your conclusion
7 regarding the significance of the number of
8 broadcasters that have signed up for the Webcaster
9 Settlement Act rate?

10 A. Yes. I mean, in some sense this just
11 comes back to the last question that counsel for
12 SoundExchange asked me, which is I assume it was in
13 their self-interest and that means they thought it
14 was better in the alternatives, but that doesn't
15 mean that in any way it was saying it was
16 effectively competitive or reasonable. It meant
17 the broadcasters saw themselves as -- their other
18 options as being worse.

19 MR. JOSEPH: No further questions.

20 CHIEF JUDGE BARNETT: Okay. Thank you,
21 Professor.

22 We will be at recess until 1:05.

23 (A short recess was taken.)

24 CHIEF JUDGE BARNETT: Good afternoon.

25 Please be seated.

1 Do we have a witness?

2 MR. STURM: Yes, Your Honor.

3 NAB calls John Dimick.

4 JOHN DIMICK,

5 being first duly sworn, to tell the
6 truth, the whole truth and nothing but the truth,
7 testified as follows:

8 MR. STURM: Your Honor, I have a
9 relatively small binder for you.

10 CHIEF JUDGE BARNETT: Thank you.

11 MR. STURM: And, Your Honor, Mr. Dimick
12 has both direct and rebuttal testimony. So what
13 we're going to do is we'll do a little background
14 and then his rebuttal and then the direct.

15 CHIEF JUDGE BARNETT: Thank you.

16 DIRECT EXAMINATION BY COUNSEL FOR NAB

17 BY MR. STURM:

18 Q. Mr. Dimick, would you state your full
19 name, please.

20 A. John Dimick.

21 Q. And could you spell it for the court
22 reporter, please.

23 A. J-O-H-N, last name is D-I-M-I-C-K.

24 Q. Where do you work, Mr. Dimick?

25 A. I work for Lincoln Financial Media

1 Company.

2 Q. Where is that located?

3 A. Corporate headquarters is based out of
4 Atlanta, Georgia.

5 Q. Can you just tell the court very
6 briefly how you got your start in the radio
7 business and how long you've been involved in it?

8 A. Yeah. I've been doing it 35, almost 36
9 years. Started when I was 15 kind of doing weekend
10 news on the air and then put my way through college
11 doing overnights and nights on the air, you know
12 pulling air shifts.

13 Eventually wound up programing a radio
14 station in Logan, Utah, which was kind of an AC
15 station, adult contemporary station. Programming
16 that for a while.

17 Went to Bakersfield, California, to
18 program an oldies station. Went back to Salt Lake
19 to program an active rock station. Kind of a --

20 Q. And what --

21 A. Active rock, Slaughter, Tesla, Wingers,
22 Scorpions, all the hair bands of the early to --
23 not a particular format we're proud of, but it
24 existed.

25 From there I programmed a top 40

1 station called Kissin' 97 in Salt Lake City before
2 I moved to Seattle to program at that time, which
3 was kind of an emerging format, called hot AC. It
4 was kind of a cross between top 40 and adult
5 contemporary music.

6 I left Seattle to go to Columbus, Ohio
7 to program a -- at that time a very big top 40
8 station in the Midwest named WNCI and eventually
9 came what is the flagship station of our parent,
10 Nationwide Communications. And eventually wound up
11 becoming the group programmer for that company
12 before it was sold.

13 I moved to San Diego, California, where
14 I worked for the predecessor to Lincoln Financial,
15 which is Jefferson-Pilot Communications, where I
16 started out as program director for the country
17 station and eventually was promoted to operations
18 manager. So I oversaw country, oldies, conversion
19 to '80s, conversion to alternatives, smooth jazz
20 with conversion to AC.

21 Q. Did you have a hair band?

22 A. No hair bands there. No hair bands
23 there.

24 And then from there was asked to come
25 and program Hot 97 in New York. For somebody in my

1 position, I mean Hot 97 is a huge and influential
2 radio station. It's arguably the largest hip hop
3 radio station in the country.

4 So I programmed that for three years
5 before getting an opportunity to return and work
6 for my old boss at now Lincoln Financial Media as
7 the vice president of programming where I was there
8 for two years before being promoted to senior vice
9 president of programming.

10 Q. So your present position is senior vice
11 president of programming for Lincoln Financial?

12 A. Yes.

13 Q. What are your responsibilities as SVP
14 as programming?

15 A. If it has something to do with the
16 product or how we engage an audience or, you know,
17 marketing, promotion, high-level technical,
18 audience outreach, that's -- in one way or another,
19 either I work directly with it or the people that
20 work directly with it work for me.

21 Q. Have you recently added a new
22 responsibility?

23 A. Oh, yeah. At the end of March I was
24 named the acting daily program director of Star 94
25 in Atlanta. It's our company's flagship station.

1 It's the biggest station, our biggest market. And
2 I'm now charged with the day-to-day programming
3 responsibilities for it as well.

4 Q. Let's talk a little bit about Lincoln
5 Financial.

6 How many radio station does Lincoln
7 operate?

8 A. We have 16 radio stations in four
9 markets.

10 Q. Okay. What are those markets?

11 A. We're in Miami, Atlanta, Denver and
12 San Diego.

13 Q. And how many music stations and how
14 many nonmusic stations?

15 A. We have ten music stations and six
16 nonmusic stations.

17 Q. Do you stream those stations as well as
18 broadcast?

19 A. Yes, sir.

20 Q. Do you have some HD stations as well?

21 A. All of our analog stations are
22 broadcast in HD1. And then we have in some areas
23 HD2 and HD3 signals. Depending on whether we
24 program them or someone else programs them, we'll
25 stream. One of ours is a religious broadcaster,

1 and they handle it. But anything that we have
2 direct control over we also stream.

3 Q. Let's turn to -- I believe it's the
4 second tab in your binder, Exhibit 4 -- NAB Exhibit
5 4009.

6 Do you have it there?

7 A. Yes, sir.

8 Q. And is that your written rebuttal
9 testimony?

10 A. Yes, sir.

11 Q. It's your signature on Page 8?

12 A. Yes, sir.

13 Q. Have you reviewed that testimony
14 recently?

15 A. Yes, sir.

16 Q. Do you believe everything in there to
17 be true?

18 A. Yes, sir.

19 MR. STURM: Okay. I move the admission
20 of Exhibit 4009.

21 MR. OLASA: No objection.

22 CHIEF JUDGE BARNETT: 4009 is admitted.

23 (NAB Exhibit No. 4009 was admitted into
24 evidence.)

25 BY MR. STURM:

1 Q. All right. Could you flip these --
2 bottom of Page 2 of your written rebuttal
3 testimony. And this was responsive to some
4 testimony that Mr. Kooker gave in his written
5 direct statement. And there's a long quote there
6 on Page 2 carrying over to page 3.

7 Are you there?

8 A. Yes, sir.

9 Q. So the first thing Mr. Kooker says is:
10 "One of the original justifications for allowing
11 statutory services to pay these lower rates was
12 that the offering under the statutory license would
13 provide a user experience similar to terrestrial
14 radio."

15 Assuming that that statement is true,
16 to what extent does your simulcast stream provide a
17 user experience similar to terrestrial radio?

18 A. All of our -- all of our streams are
19 exactly identical to our over-the-air products.
20 It's a hundred percent simulcast. They're the
21 same. I mean whatever you hear over the air you
22 will hear on our stream.

23 Q. Okay. Are there any differences at
24 all?

25 A. There can be some slight difference in

1 commercials where we have to replace an
2 out-of-market -- you know, part of our
3 out-of-market stream with a generic commercial as
4 opposed to a local commercial.

5 But that happens very, very rarely.
6 And so, other than that, no. They're -- whatever
7 we say over the air you hear on the stream.
8 Whatever we play over the air you hear on the
9 stream.

10 Q. Mr. Kooker goes on to say and -- this
11 is the second paragraph -- that: "The fundamental
12 distinction between statutory services mirrors
13 terrestrial radio and directly licensed services.
14 Enabling customized music access is rapidly
15 disappearing. Statutory services now provide
16 highly customized offerings to consumers."

17 Do you see that?

18 A. Yes, sir.

19 Q. Is your simulcast stream becoming more
20 customized to the user?

21 A. There's no way -- no. There's no way
22 for the user to customize our stream. You either
23 start it, or you stop it. But that's about the
24 only thing that you can do. It's exactly the same
25 as what we put out over the air.

1 Q. And then he talks about various
2 feedback mechanisms. I won't read the whole thing.
3 Sophisticated algorithms and user interface
4 controls and that kind of thing.

5 Do you have anything like that?

6 A. All of our streams are set up -- no.
7 There is -- we have nothing -- there's just --
8 it's -- exactly what you hear over the air is
9 exactly what you hear on the stream. So there's --

10 Q. How do you get feedback from listeners?

11 A. Telephone, audience research. I mean
12 we have a -- somebody calls or -- and, you know,
13 they give us feedback.

14 But once again, there's no -- there's
15 no one thing any one individual can do to provide
16 us feedback of any kind of substance that would
17 affect what we would put on either over the air or
18 on a stream.

19 Q. In the last sentence in that paragraph,
20 he talks about individualized programs streamed to
21 users.

22 Do you give individualized programs to
23 users?

24 A. No. We -- once again, we're a
25 simulcast. So what we have -- what we have over

1 the air we have on the stream. And it's very much
2 a one-point-to-many-point sort of system.

3 There's no way to customize what it is
4 that we do or for a listener -- an individual to
5 customize anything.

6 Q. Let's move on to Paragraph 9 of your
7 written rebuttal testimony. And you mentioned
8 there there's some various places where users can
9 access your station stream. And one of them that
10 you mention there is TuneIn.

11 Do you see that?

12 A. Yes, sir.

13 Q. Have you used TuneIn personally?

14 A. Yes.

15 Q. And just for this case or previously?

16 A. No. I mean -- well, we've used TuneIn
17 for quite some time. I've used TuneIn for quite
18 some time.

19 Q. Okay. And what is TuneIn?

20 A. TuneIn, for me and for us, is a -- kind
21 of like an aggregator. It's a one-stop shop. It's
22 sort of where everybody goes to find out what's
23 being streamed.

24 Q. And how did it come about -- and I take
25 it your stations are on TuneIn?

1 A. Yes.

2 Q. So how did that come about?

3 A. And I'm assuming we're talking about
4 our music stations.

5 Q. Yes.

6 A. Our music stations are on TuneIn.

7 You know, for a while, when the
8 company -- I -- my understanding, when the company
9 TuneIn was first created, they were just sort of
10 taking streams and -- or taking over-the-air signal
11 and putting it on a stream.

12 And several of us kind of went, yeah,
13 that's not cool. So we reached an agreement with
14 them several years ago that we would provide them
15 our stream. And, in return, if they sold, you know
16 what we call a gateway ad or a preroll ad, that we
17 would have an opportunity to share in the revenue
18 of it.

19 But -- so that's where we are now. We
20 feed them our stream, and they make it available to
21 their consumer base.

22 Q. Who pays for the royalties when your --
23 for the stream on your station when a listener
24 comes in through TuneIn?

25 A. We do.

1 Q. Are you trying to get a national
2 audience by being on TuneIn for your stations?

3 A. No. I mean that's -- our stations are
4 very much designed to be live and local and focused
5 on our community.

6 So what we try to get through TuneIn is
7 access to -- that anybody can access us wherever
8 they happen to be, you know, in our community. Or
9 if they're out of the community but want to know
10 what's going on in Atlanta or want to know what's
11 going on in San Diego, you know, they can access it
12 from there.

13 You know, if you're out of town when a
14 hurricane hits Miami, you know, you might not be
15 able to hear our over-the-air signal from wherever
16 you are, but you can access it through TuneIn or
17 one of our other places.

18 Q. Does TuneIn add to your streams any of
19 the customization features that Mr. Kooker
20 discussed?

21 A. No. You can't. No. There's no way
22 for them to do anything. Once our stream starts,
23 there's nothing else you can do but let it play.
24 So they don't have the ability to -- once the
25 preroll is done, you know, TuneIn's involvement for

1 any kind of interjection in our stream is over.

2 Q. Now, you're familiar with the fact that
3 TuneIn has a search function?

4 A. Uh-huh. Yes.

5 Q. So I'm a big Bruce Springsteen fan.
6 Let's say I want to hear "Born to Run," and I
7 search for "Born to Run," and I'm hoping to hear it
8 on a Lincoln Financial station.

9 How many of your ten music stations
10 might play "Born to Run"?

11 A. In general, one, maybe another one,
12 based on what we have going on at any given time.

13 Q. Which --

14 A. WMXJ in Miami, Magic 102.7.

15 Q. How big is its playlist?

16 A. We run between about 280 and 320 or 330
17 songs.

18 Q. So let's say I get lucky, and it
19 happens to be playing on that station, and I click
20 on it.

21 Then what would happen?

22 A. If you click on it on TuneIn?

23 Q. On TuneIn, yes.

24 A. Well, assuming once you got through the
25 preroll, whatever it was, if there was, then you'd

1 join our stream in progress. I mean you'd join us
2 wherever we were in the part of the song that we
3 were playing, most likely not at the beginning but
4 some point in the song.

5 Q. And I would have to listen to the
6 preroll while the song is playing, so I wouldn't
7 get to hear that?

8 A. Well, no. You literally -- it's just
9 kind of like you'd turn on the radio. You hear our
10 song, wherever we are in the song.

11 Q. And then what happens at the end of the
12 song?

13 A. Depending on what's next to -- what's
14 programmed next over the air and going on. I mean
15 local traffic, local weather. We could be reading
16 an event that's going up.

17 Or, you know, we could actually play
18 what we call a liner, which says the station name
19 and "Playing Michael Jackson, 'Beat It.'" It's
20 just whatever's next for us to play.

21 Q. And I can't control or influence what
22 happens next?

23 A. No, not -- no. Unless you turn it off,
24 and then you can control it. But that's about it.

25 Q. And you're hoping that won't happen.

1 A. Yeah. Well, my mortgage company hopes
2 that.

3 Q. Now, if Mr. Pomerantz said that this
4 is -- the search function is almost on demand,
5 would you agree with that?

6 A. I don't -- there's no demand. It's
7 kind of like a -- maybe on scan. But there's no on
8 demand. There's -- if you're searching, you're
9 searching. There's nothing I can do about it.
10 It's not like I'm going to meet your demands. So
11 no. For me it wouldn't be considered on demand.

12 Q. And are you trying to get listeners to
13 use -- to get onto your stream in this way to
14 search for individual songs?

15 A. No. No. That's not what we do. We're
16 sort of a -- well, we're a broadcasting service.
17 You know, we're looking for a total user
18 experience.

19 If -- there are other places you can
20 go. If you want to hear Bruce Springsteen, if
21 you're a big Bruce Springsteen fan, and you don't
22 want the wait -- if I play two Bruce Springsteen
23 songs on Magic, and you don't want to wait for me
24 to play the other 318 songs before I come back to
25 Bruce Springsteen again, you can go find a way to

1 do that.

2 So we don't -- that just doesn't make
3 any sense. I'd like to think you'd search for like
4 events going on in Miami and find our station in
5 Miami but not searching for a Bruce Springsteen
6 song.

7 Q. Let's switch over to your direct
8 testimony, which hopefully is the first tab in your
9 book, Exhibit 4002.

10 Got it there?

11 A. Yes, sir.

12 Q. Is Exhibit 4002 your written direct
13 testimony?

14 A. Yes, sir.

15 Q. And that's your signature on the last
16 page?

17 A. Yes, sir.

18 Q. Have you read over your written direct
19 testimony recently?

20 A. Yes, sir.

21 Q. Any changes to be made before I move it
22 in?

23 A. There's one that I noticed that was a
24 typographical error. One of our radio stations in
25 Denver is listed here as KWRZ --

1 Q. Which page are you on?

2 A. On Page 5.

3 Q. Okay.

4 A. It's listed as KWRZ, and it's actually
5 KRWZ, AM 950.

6 And then on the footnotes on Page 4 --

7 Q. And that's where you're talking about
8 some of your additional HD channels?

9 A. Yeah. You know, through the normal
10 course of business, you know, some channels come
11 up; some channels go down. I mean it's a constant
12 evolution. And we try new things. You know,
13 maybe, you know we lease it out to a sports station
14 that's no longer there.

15 So it's changed. But the HD channels
16 are pretty insignificant to our overall operation.

17 Q. So it changes -- some of the formats of
18 those stations have changed?

19 A. Yeah. I think one was listed as
20 sports. It's now dark. But they're just small
21 nuancey changes.

22 Q. With those changes noted, you believe
23 everything else in the written direct testimony is
24 true?

25 A. Yes, sir.

1 MR. STURM: Okay. I move the admission
2 of the Exhibit 4002.

3 MR. OLASA: No objection.

4 CHIEF JUDGE BARNETT: 4002 is admitted.

5 (NAB Exhibit No. 4002 was admitted into
6 evidence.)

7 BY MR. STURM:

8 Q. All right. And then behind your
9 testimony, there are a number of additional
10 documents that were attached to your written direct
11 testimony. It's Exhibits 4102 through 4109.

12 A. Yes, sir.

13 Q. And are those all documents that were
14 attached to your written direct testimony?

15 A. Yes, sir.

16 Q. Okay. And you're familiar with all
17 those documents?

18 A. Yes, sir.

19 MR. STURM: Move the admission of 4102
20 through 4109.

21 MR. OLASA: No objection.

22 CHIEF JUDGE BARNETT: 4102 through 4109
23 inclusive are admitted.

24 (Exhibit No. 4102 through 4109 were
25 admitted into evidence.)

1 MR. STURM: Thank you, Your Honor.

2 BY MR. STURM:

3 Q. Okay. So let's go back to your written
4 direct testimony.

5 For Lincoln's music stations -- 10 out
6 of 16, right?

7 A. Yes, sir.

8 Q. Do you believe that music is an
9 important component of the programming of those
10 stations?

11 A. Yeah. It is a very important
12 component, but it's not the only component.

13 Q. Okay. Can you have a successful
14 station with just music?

15 A. In my 35 years of experience, no.

16 Q. Why not?

17 A. Primarily because, you know, music,
18 while it's important, is for us in radio sort of
19 the least -- it's the least unique thing that we
20 have. Every radio station can play Katy Perry if
21 they want to. So just the fact that I play a song
22 doesn't mean that it's unique to me. I'd love it
23 if it could be, if I was on the receiving end of
24 all that exclusivity. But it's not.

25 So everything else is -- it's kind of

1 like music just sort of levels the playing field.
2 It's what you do after that that really starts to
3 help separate you from your competition in the
4 market.

5 Q. And you discuss some of these
6 components in your written direct testimony. And I
7 don't want to go through each and every one of
8 them.

9 But how is on-air talent important?

10 A. If -- you know, on-air talent is for us
11 the -- it's sort of our first line of product
12 differentiation and our most important line of
13 product differentiation, primarily because these
14 people are very unique.

15 I mean there's only one Larry, Kendall
16 and Kathie, our morning show in Denver. There's
17 only one Drex, Cassiday and Tingle, our morning
18 show in Atlanta. There's only one Heather Branch,
19 who's our midday person, or one DJ Jones.

20 So I don't to want to belabor the
21 point, but it's where we spend a lot of time,
22 effort, energy, money. Because it's the thing
23 that's the most unique about our radio stations.

24 And then you start talking about
25 marketing and promotion. That's sort of another

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1 part of what we build our radio stations on and the
2 uniqueness of that and how we try to -- I mean
3 we literally will try and find it out with other
4 broadcasters about who gets an event and who
5 doesn't. So that provides another level.

6 So it's a constant battle for what's
7 unique and what's original.

8 Q. And who are you battling with?

9 A. The other radio stations in town.
10 Sometimes the television stations, but it's mostly
11 -- you know, it's my competitors in Atlanta that I
12 try to beat or any one of the other markets.

13 Q. In Paragraph 32 of your written direct
14 testimony, right in the middle of that paragraph
15 you say: "A great morning show can even draw
16 listeners from outside the base music demographic
17 of the station."

18 What do you mean by that?

19 A. Probably the close -- the quickest
20 example I can think of is we have a rhythm top 40
21 station Denver, KQKS, KS 107.5. Those stations are
22 targeted to perform well with 18 to 34 persons.
23 They tend to kind of be younger demo, cool sounding
24 station.

25 Our morning show Larry, Kendall and

1 Kathie, not only do they perform extremely well 18
2 to 34, but they perform well 18 to 49 and 25, 54,
3 you know, which is way outside the expected
4 performance of a radio station like that.

5 So when you see a station perform that
6 well, 25, 54, on a radio station that's focused
7 sort of that young, it's almost like the morning
8 show, you know, succeeds in spite of the music that
9 we play.

10 People will listen to them for their
11 humor and kind of ignore, you know, maybe the songs
12 that we play. I don't think they hate it, but they
13 just -- it's not what they're there for.

14 Q. Because they're not going to play Bruce
15 Springsteen, are they?

16 A. Yeah. No. We're not going to play
17 Bruce Springsteen there. Wiz Khalifa maybe. Bruce
18 Springsteen, no.

19 Q. Are there -- do you also provide local
20 news, sports, weather, information?

21 A. Constantly on most of our radio
22 stations. In some way, shape, or form it's, you
23 know, newscasts, traffic reports, weather,
24 community events, what's happening in the
25 community, public service, you know, all the way

1 from, you know, here's what's going on this weekend
2 at a park to here's a charity function while we're
3 trying to raise money for children of cancer. So
4 it's nonstop.

5 Q. And are there times when that kind of
6 information is particularly important?

7 A. Yeah. You know, I was thinking. We're
8 -- we -- I'm not so sure you want to live in a
9 Lincoln radio station market. We have hurricanes
10 in Miami. I think they called it snowmageddon in
11 Atlanta where the freeways froze up and, you know,
12 nobody could drive around. It was really stupid to
13 see, and I got a front-row seat it to. I could see
14 out my window.

15 But, you know, we were giving people
16 information. People were calling us with
17 information about where their loved ones were.
18 Emergency response people were calling us, you
19 know, providing us with information to give to
20 people.

21 In Denver a couple of years ago a bunch
22 of mountains caught on fire, and we were providing
23 evacuation routes for people that were caught in
24 those general areas. It just happened to hit an
25 area where one of our country stations, KYGO really

1 performance well. So we knew we had a lot of
2 listeners up there.

3 So willing to drop music and go to just
4 this nonstop coverage of telling people what's
5 going on.

6 Same thing happens in San Diego. You
7 know, we have earthquake preparedness because it's
8 just a matter of time. But, you know, the fires
9 out there. And it even goes further than that kind
10 of information.

11 It's literally -- like when an area
12 called Mimona in San Diego caught on fire,
13 surprisingly -- you know, something that most
14 people don't realize is there are a lot of horses
15 in that general area.

16 When your house catches on fire, when
17 the forest is burning, you can go find a hotel.
18 You can't necessarily do that for a horse.

19 So we began working with Humane Society
20 and trying to find places where we could put these
21 horses or put large animals just because it's just
22 something you don't think about.

23 So we do that hopefully -- we do it
24 when necessary, hopefully not too much. But...

25 Q. Let's change gears here and go on to

1 Paragraphs 41 to 47 of your written direct
2 testimony where you discuss emotional value when
3 the labels attempt to promote their music on the
4 radio.

5 So what personal involvement do you
6 have with that?

7 A. It's kind of been a long process. I
8 mean when I was a program director, back before I
9 became the vice president of programming, you know,
10 I would handle those calls and promotional messages
11 and CDs on a daily basis.

12 Once I got to the position that I was
13 in before also assuming the program directorship at
14 Star, it was more an intermediary -- intermediary.
15 Sorry. You know, I --

16 Q. What do you mean by that?

17 A. Well, through 35 years of being in the
18 business, I know a lot of people at the labels. A
19 lot of people at the labels know me.

20 And so, as we hire new program
21 directors or bring in new music directors,
22 promotions directors, you know, there's --
23 sometimes there's just introductions that need to
24 be done.

25 Or I may know somebody at a label one

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1 of our program directors doesn't know, so I provide
2 that sort of building of relationships.

3 And I'm also -- have been on
4 occasion -- I'm kind of like a mediator. If
5 sometimes there's somebody at a label that I know
6 that feels like they're not getting a fair shake in
7 getting a song on our air, and, you know, they're
8 either angry at the program director or worried
9 that there might be something else going on, I'll
10 arrange to have, you know, sort of a -- it's not
11 necessarily at the level of a beer at the White
12 House, but it's -- you know, try to work that kind
13 of stuff out and make sure that everybody's getting
14 a fair shake.

15 Q. So do artist and labels routinely
16 approach Lincoln to play their music?

17 A. Yeah. It's almost -- "nonstop" is
18 probably not an accurate word, but it is frequent.
19 In the old days, old school, they used to FedEx us
20 tons of CDs. Now it's e-mails and MP3s through
21 mail and fliers and phone calls and in-person
22 visits to the station and, you know, on-air
23 interviews and private performances.

24 Q. And do the artist participate in those
25 efforts?

1 A. Oh, yeah. Yeah. I mean especially new
2 artists and just kind of like up-and-coming
3 artists.

4 Brand-new artists are -- the labels
5 are, you know, reasonably aggressive in trying to
6 get new artists exposed on the radio. So they
7 bring them by. There's phone calls. There's
8 conference rooms where, you know, people come in
9 and play a guitar or play a piano and, you know,
10 perform for us in a conference room.

11 Or they'll let us bring in a small
12 group of people or, you know, even put them on the
13 air. If they're a more established, you know,
14 artist, you know, they'll ask for an on-air
15 interview, and we'll put them on the air.

16 Q. In the promotional activities directed
17 at you, do the labels distinguish between music
18 going over the air and what's going over the
19 stream?

20 A. It's the same -- no. It's the same
21 thing. It's -- there's no difference. So that --
22 I'm trying to answer your -- there's no way for
23 that to come -- it just doesn't come up. There's
24 no difference, so it -- no.

25 Q. Does that -- have any of them expressed

1 any aversion to being on the stream?

2 A. No. But once again, that just --
3 everybody knows that, you know, if -- whatever we
4 play over the air plays on the stream. So it's --
5 I'm trying to think of an analogy. But it's just
6 the -- it's one and the same thing.

7 Q. Let's change gears again and talk about
8 revenues from streaming and profits or losses. And
9 I'm going to -- I think I can probably ask these
10 questions so we don't have to close the courtroom.

11 If I ask a question in a way that
12 requires confidential information, let me know.

13 A. Okay.

14 Q. I'll try to rephrase it, or we can
15 close the courtroom if we need it.

16 Generally, how has Lincoln historically
17 received revenues from streaming? What are the
18 sources?

19 A. Up until we moved to what's now called
20 total line reporting --

21 Q. Let's discuss the format before you
22 made the change.

23 A. Okay. Spot insertion and prerolls. We
24 would insert commercials and, of course, preroll if
25 you were joining a stream.

1 But, you know, that was the only way.
2 I mean it was -- I mean essentially the same place
3 thing; we just replaced the commercials.

4 Q. So there's two ways, prerolls and ad
5 insertions, right?

6 A. Yes, sir.

7 Q. Okay. And preroll is what you hear
8 before you click on "Listen Live" or whatever, and
9 you hear an ad or see an ad -- see and hear an ad
10 before you get to the stream?

11 A. Right. If you click on "Listen Live,"
12 the preroll starts. There's no way to get to our
13 stream without seeing the preroll.

14 Q. Do you let people skip those?

15 A. No. No.

16 Q. Even if they want to?

17 A. It's not like YouTube. You've got to
18 watch it.

19 Q. And then what is ad insertion?

20 A. Ad insertion was a technology that was
21 developed when radio stations wanted to start
22 streaming again after some settlements through
23 Astra.

24 But we basically just take -- when we
25 start playing commercials over the air, we would

1 stop what we were streaming and put different
2 commercials in. So that was -- and then, when we
3 were done playing those commercials, if we didn't
4 have a -- what we call a full-stop set, we'd have
5 to fill it with Smoky the Bear and McGruff The
6 Crime Dog and various other public service
7 announcements.

8 That's basically spot insertion. We
9 just take the commercials that we're playing over
10 the air and off the stream and put different
11 commercials in.

12 Q. And to the extent you couldn't sell an
13 ad on the stream, then you'd have to fill that time
14 some other way?

15 A. Yeah, which was the -- yes. That's --
16 that was one of our biggest problems with ad
17 insertions.

18 Q. Well, so why did this ad insertion
19 model not work for you?

20 A. Well, there's -- you know, our -- a
21 couple of reasons. One is that, you know, the
22 demand for ad insertion -- the demand for our
23 streams wasn't high. And so trying to sell them
24 was problematic because the demand for them wasn't
25 nearly as high as the demand for our over-the-air

1 product.

2 So when we'd go to a break over the
3 air, we may have, for example, six minutes worth of
4 commercials in a break over the air but only a
5 minute worth of commercials on the stream. Then we
6 have to fill it with something or go silent.

7 And in my experiencing, you know, a
8 radio station shouldn't be silent at any time. So
9 we'd wind up having to fill it. And we fill it
10 with whatever content we could find, usually
11 station promotional announcements, public affairs
12 announcements, public service announcements.

13 It was one of the things that just
14 really made that model not work for us.

15 Q. Was that a monetarily successful model?

16 A. No. No. I mean if you're talking
17 about profit, yeah, no. Not even close. We made
18 -- we were able to generate some revenue for it.
19 But the revenue versus expense was nowhere near
20 profitable.

21 Q. And so what change have you made more
22 recently?

23 A. A couple of years ago Nielsen allowed
24 us to do what they called TLR, which is total line
25 reporting.

1 If our over-the-air signal and
2 streaming signal are substantially the same, we can
3 apply for what they call TLR, which is Nielsen will
4 combine the ratings from both our stream and the
5 over-the-air and issue one rating.

6 So there's some requirements that -- on
7 how we replace -- if we replace commercials, how we
8 replace them. But that happens so -- so rarely
9 that -- matter of fact, I'm not aware of something
10 that's happened in the last couple of months where
11 we had to replace commercials.

12 Q. What was an example of when you did
13 have to replace a commercial?

14 A. Like McDonald's, if -- if they want to
15 do their McRib special in Miami, but they don't
16 want the rest of the country to know that, you
17 know, somebody in Miami is doing a McRib special,
18 apparently even some of their other vendors, they
19 would ask us to do what we call in-stream
20 replacements.

21 So Nielsen rules were that we either
22 have to -- we could replace the streamed
23 commercial -- out-of-market stream commercial in
24 one of two ways. We could either put a
25 substantially similar but generic commercial on the

1 air from the same advertiser, you know, so a
2 McDonald's general spot, an example would be the
3 I'm Loving It" commercial. Or we could replace it
4 with a station promotion, some kind of promotional
5 announcement.

6 But the one rule that Nielsen has is
7 that we couldn't try and sell that to anybody else.
8 So we didn't -- it's not like we had a revenue
9 opportunity. If we had to replace the McDonald's
10 spot, we could either replace it with another
11 commercial or a station promo but couldn't sell it.

12 Q. You don't have to do that all that
13 frequently; is that correct?

14 A. No. I mean it was more of an issue of
15 advertisers wanting the ability to do it as opposed
16 to the need to do it.

17 I don't get down into our day-to-day
18 business at that level on a regular basis. But I'm
19 not aware of anything that's happened in the recent
20 past.

21 Q. In Paragraph 18 of your written direct
22 testimony, which is on Page 7 --

23 A. Yes, sir.

24 Q. -- you say that: "Streaming audience
25 measurement remains in its infancy."

1 Do you see that?

2 A. Yes, sir.

3 Q. What do you mean? Could you explain
4 why that is?

5 A. The over-the-air ratings are fairly
6 well substantiated, and advertisers are comfortable
7 with them, and there's a monitoring system in place
8 to do it and relates what advertisers understand.

9 Q. What system is that?

10 A. It's PPM, Nielsen PPM. So it's a --
11 you know, the Personal People Meter or Portable
12 People Meter, however you want to -- you know, it's
13 just PPM. So --

14 Q. Is that available everywhere?

15 A. No. It's available in the top 50
16 markets with PPM. And then there's a different
17 methodology that they use for the smaller markets
18 up to a certain point. And then there's no ratings
19 methodology available at all for various -- at
20 least Nielsen doesn't offer a ratings methodology
21 at all for very small markets.

22 Q. And do you have to pay for the Nielsen
23 ratings?

24 A. Yeah. Yeah. They're pretty expensive.
25 Actually, they're really expensive. Some --

1 because of the markets that we're, in top 20
2 markets, and a lot of the -- you know, the
3 advertisers have that kind of -- they understand
4 why they're buying.

5 So you're almost required -- if you're
6 going to run kind of a major operation, it's almost
7 a necessity -- it is a necessity to have Nielsen
8 ratings. There's no way to tell advertisers how
9 big you are without them.

10 Q. Okay. So now compare that with
11 streaming.

12 A. With streaming right now, it's sort of
13 a mixed bag. There are people that are getting
14 into it. Triton's getting into it. Nielsen is
15 getting into it. There's some measurements that
16 you have.

17 But to try and get them to equate back
18 to what we do over the air is difficult. You know,
19 I mean duplicating people, duplicating listening
20 time. There's just no -- there's no accurate way
21 right now to get an audience -- an audience
22 estimate out of them.

23 So it may be coming in the future, but
24 I don't think it's any time soon.

25 Q. What has the effect of going to TLR

1 been for Lincoln Financial Media?

2 A. In which way? Money or audience or
3 both? Both?

4 Q. Do both.

5 A. Okay. In money, we've lost more money.
6 What we did know -- what I believe is that the way
7 we were doing it was spot insertion. We weren't
8 seeing any headway there.

9 So the kind of definition of insanity
10 is doing the same thing over and over again
11 expecting a different result. So we figured we
12 might try something different.

13 So we knew we were going to take
14 another short-term loss. So what we tried to do --

15 Q. And what would the short-term loss be?

16 A. Well, all of a sudden now, if we pull
17 out any availability for spot insertion, obviously
18 -- even though there were small dollars there,
19 there were dollars. So those dollars went away.

20 We couldn't insert the commercials. So
21 we couldn't charge them. We kept it preroll.

22 But what we did was got an immediate
23 improvement in our product, because now we didn't
24 have to do the clunky spot insertion where things
25 got hacked up. And buffering and all kinds of

1 crazy stuff was happening when we were inserting
2 spots.

3 So now it sounds -- wasn't exactly like
4 it sounds over the air all the time. So that's
5 helped.

6 So -- and what we're hoping to do is
7 that eventually, through TLR, Nielsen will be able
8 to, you know, pick it up. We now share the same
9 coded signal that we do over the air. So the
10 meters hear the same thing. So maybe we get some
11 more ratings in there.

12 We've seen little spurts. I mean we've
13 -- you know, we've seen something that's like --
14 almost like a hatchling --

15 Q. What's the smallest increment that you
16 could get?

17 A. A .1 rating point, which is really,
18 really small and wouldn't make you available --
19 wouldn't -- no advertiser's going to buy a .1 when
20 there are stations in the market that sell .5, .6,
21 1.0. So .1 is the smallest one you can get.

22 And we've been able to see it a couple
23 of times in a couple of our stations on a couple of
24 months. Like our station in Miami, sometimes we'll
25 see it around Christmastime. When we play a lot of

1 Christmas music, we'll see a little bump in the
2 stream. And then the numbers go back down.

3 Or we'll just see kind of a gradual --
4 the difficulty we're having right now is, until we
5 can get it to consistently happen, those .1s, .2s,
6 .3s, if we ever see that, advertisers aren't
7 willing to -- advertisers aren't willing to buy it.

8 I mean, first of all, ratings come in
9 behind. So I mean when we see a ratings bump, what
10 we did to get the rating is already over. So
11 advertisers aren't buying that. You know, they're
12 buying our ability to sustain it. And we just
13 haven't been able to sustain it yet.

14 Q. And so financially how are you doing
15 now that you've moved to TLR?

16 A. Oh, we're losing money. I mean so --
17 it's still a tough pot. You know, we're still
18 hoping that we can find -- we can find that magic
19 elixer.

20 I can tell you that, you know, the
21 expenses on the stream are astronomical. It is
22 a -- it's a hard thing to overcome SoundExchange
23 fees. They're just -- they're really expensive.

24 Q. Okay. And let's put some specifics on
25 that.

1 Could you look at Page 12 of your
2 written direct testimony.

3 Do you it have there?

4 A. Yes, sir.

5 Q. And again, maybe we can do this without
6 discussing this specific numbers.

7 But can you describe for the court
8 generally what this chart shows?

9 A. I mean it's broken down by, you know, a
10 full year of 2013 and, you know, 2014 through
11 August 31. It has two of our music stations --
12 streaming music stations in Miami and two of our
13 music streaming stations in Denver.

14 Q. Why did you chose those stations?

15 A. I mean we -- the revenue that we make
16 is so insignificant, that trying to measure it on a
17 regular basis and engage at that level is extremely
18 difficult and time consuming.

19 But we do have some institutional
20 knowledge in our controller in Miami and our
21 controller in Denver, who were able to kind of
22 like, from an experimental standpoint, really kind
23 of figure out -- we wanted to know what to do.

24 So instead of trying to implement it
25 companywide, we just picked the two markets that

1 more often than not have had success with streaming
2 and tried to take a look at that, see what that
3 looked like.

4 Q. What does the streaming revenue column
5 show?

6 A. That's everything that can be directly
7 attributed to the stream: the preroll, the spot
8 insertion, any revenue that's directed at the
9 stream.

10 Q. Now, for more recent periods, would TLR
11 have any affect on the streaming revenue?

12 A. As I said before, TLR was -- we knew
13 that going to total line reporting would diminish
14 our ability to access revenue because we can't
15 insert spots.

16 So the reductions in revenue that you
17 see were kind of a calculated move on our part to
18 try something new and see if we can get something
19 going somewhere else.

20 Q. So does that explain why revenues are
21 going down somewhat 2013 to 2014?

22 A. Yes.

23 Q. SoundExchange royalties, I assume, is
24 self -- self-evidence.

25 The third column is streaming

1 bandwidth, scheduling and composer royalties.

2 Can you explain what those are and why
3 you chose to include them in the chart?

4 A. Well, I mean the streaming bandwidth is
5 what we pay Triton, our streaming provider.
6 They're the people we send our signal to. And they
7 distribute it. So, you know, they charge us a fee
8 for doing that.

9 The bandwidth charges that we tie up in
10 order to send the stream or the people tie up
11 with with Triton, you know, there's a charge for
12 that.

13 There's RIA and -- and -- or excuse me.
14 There's ASCAP, SESAC and BMI fees, the licensing
15 fees that go into that. So anything that was in
16 there is, you know, a cost that would directly go
17 away if we stopped streaming.

18 So, in other words, we didn't put like
19 the program director cost who puts together the log
20 and all the production costs of people and
21 everything else. That's just -- we really wanted
22 to take a look at how much it was costing us to do
23 this.

24 So those are -- like I said, if those
25 numbers -- the numbers in that column are, if we

1 stopped streaming, those expenses would immediately
2 just go away.

3 Q. And the final column is the loss with
4 respect to direct revenues and direct costs?

5 A. Yes, as sad as that may seem.

6 Q. If royalties stay about the same, do
7 you see any likelihood that this picture is going
8 to change substantially?

9 A. No. I mean from a business
10 perspective, when you take a look at that, and
11 honestly, when we started putting together this
12 chart where you asked us to put together this chart
13 and we were trying to figure it out, it was
14 astounding.

15 I mean this graph alone caused major
16 discussions inside our company whether we should
17 continue to do this or not. Because trying to
18 sustain these losses -- these kinds of losses over
19 a long period of time is just not a good business
20 model.

21 So unless we see -- I mean, you know,
22 bandwidth charges are going down. We pay less and
23 less for bandwidth every year. It gets cheaper.

24 So unless some other costs go down, we
25 -- I don't see a foreseeable business model doing

1 it.

2 Q. And is whether or not to continue
3 steaming something that continues to be under
4 discussion?

5 A. Every month when we -- you know, when
6 we pay bills.

7 MR. OLASA: Objection, Your Honor.
8 This part is beyond the scope of the written
9 direct.

10 CHIEF JUDGE BARNETT: Are you -- you
11 look like you're holding up.

12 MR. STURM: Yes. That was my last
13 question.

14 CHIEF JUDGE BARNETT: Okay. Overruled.
15 We'll leave that in the record.

16 MR. STURM: Thank you, Your Honor.

17 CHIEF JUDGE BARNETT: Thank you.

18 Mr. Olasa.

19 JUDGE STRICKLER: Just before -- you
20 can go on up to the podium.

21 Just a question for you following up --
22 good afternoon, by the way.

23 THE WITNESS: Good afternoon.

24 JUDGE STRICKLER: A question for you
25 with regard to something you just talked about, in

1 particular, with reference to a statement you make
2 in Paragraph 18 of your written direct testimony
3 and then again in Paragraph 20 -- a different
4 statement in Paragraph 23.

5 So take Paragraph 18 first.

6 THE WITNESS: Sure.

7 JUDGE STRICKLER: You say: "Many of
8 our advertisers are unwilling to pay anything extra
9 for inclusion of their advertisements on our
10 streams."

11 And you talked about that at length
12 this afternoon, right?

13 THE WITNESS: Yes, sir.

14 JUDGE STRICKLER: And you also talk
15 about how ad insertion now is no longer being done
16 because of the reporting requirements.

17 And then on Paragraph 23 you say:
18 Well, we do not believe our listeners would pay a
19 subscription fee to receive our streams, close
20 quote.

21 Do you see that?

22 THE WITNESS: Yes, sir.

23 JUDGE STRICKLER: So you're not making
24 money because the advertisers won't pay more. You
25 can't get revenue from listeners because they won't

1 pay for streaming. So there's no revenue source
2 for it. I understand you just saw this chart, and
3 you said it's an eye opener for you.

4 THE WITNESS: Right.

5 JUDGE STRICKLER: But it's probably
6 pretty intuitive to you before you saw the chart.
7 If nobody is paying for it, you're not making any
8 money on it.

9 What's the economic interest in doing
10 it while rates -- and you've been doing it for
11 eight years, you've said.

12 THE WITNESS: Yes.

13 JUDGE STRICKLER: What's the economic
14 incentive to do that for eight years? If you're
15 losing money chronically, you're certainly not
16 making it up on volume.

17 THE WITNESS: No, no. Really it's, you
18 know, kind of -- one of the things that we do is
19 try to skate to where the puck is going to be.

20 And so, you know, trying to be in all
21 places, the same with HD, is to have our services
22 there where listeners might find us.

23 So -- because they start moving over to
24 streams, you know, we want to be there like
25 everybody else, like our competitors.

1 JUDGE STRICKLER: Your hockey analogy
2 intrigues me because losing money and having no
3 source of revenue seems more like an own goal than
4 moving the puck across the blue line.

5 THE WITNESS: Yeah. It's just -- you
6 know, we don't have to stream. We take a look at
7 it and go there's -- we think there's something
8 there. We want to try and be there.

9 We know that more and more consumers
10 are moving to the convenience of their mobile
11 phones. We know that automakers are, you know,
12 rapidly gearing toward Internet-accessible
13 features.

14 That's kind of like why we're on
15 TuneIn, so that when -- we make our living mostly
16 in morning shows with funny, entertaining people in
17 cars on commutes to and from work and in the
18 office. So to be able to have our product there is
19 -- it's pretty important.

20 JUDGE STRICKLER: So is it fair to say
21 you're trying to invest in a presence in that
22 market in the anticipation that it's a burgeoning
23 market, so you'll be there when the market takes
24 off?

25 THE WITNESS: That's what we've been

1 saying for eight years. Yes, sir.

2 JUDGE STRICKLER: Okay.

3 THE WITNESS: And that eventually there
4 might be a there there, and it's incumbent upon us
5 to try and figure out how to make that work.

6 JUDGE STRICKLER: To keep that going,
7 you need lower rates?

8 THE WITNESS: Yes. I just -- I can't
9 tell people, "Go listen to our stream," if I move
10 them from over the air to the stream. Because it
11 immediately begins to cost me money.

12 The second I put one listener on a
13 stream it immediately begins to cost me money. And
14 advertiser don't buy one listener. Advertisers buy
15 a bunch.

16 So I mean that's sort of the place that
17 we're in right now, was I'd love to scream from the
18 rooftops, "Listen to our stream. Listen to our
19 stream." But I can't afford to do that because my
20 costs go up long before my revenues go up.

21 JUDGE STRICKLER: And you're hoping
22 that loss gets offset down the road when the market
23 finally takes off?

24 THE WITNESS: Yes, sir.

25 JUDGE STRICKLER: Okay.

1 CROSS-EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE

2 BY MR. OLASA:

3 Q. Good afternoon, Mr. Dimick.

4 A. Good afternoon.

5 Q. My name is Kuruvilla Olasa, and I

6 represent SoundExchange.

7 And I think we can keep most of this
8 public, in fact, maybe all of it public. If at any
9 time I ask you a question and you need to get into
10 some restricted material, we can close the
11 courtroom.

12 Is that okay?

13 A. Sure. Thank you.

14 Q. Let's start with your rebuttal
15 testimony. And that's Tab 2 in the binder that I
16 just put on your desk.

17 A. Okay. So the binder that was here, I
18 should switch to this one?

19 Q. You can put that aside. We may look
20 back at it, but for now...

21 A. Okay.

22 Q. And that's your written rebuttal
23 testimony in front of you?

24 A. Yes, sir.

25 Q. And you reject the contention that

1 simulcast services are converging with on-demand
2 services, right?

3 A. I'm sorry?

4 Q. You reject the contention that
5 simulcast services are converging with on-demand
6 services, right?

7 A. Yes. Our simulcast services.

8 Q. Sure.

9 And that's based on your experience at
10 Lincoln Financial?

11 A. Yes.

12 Q. But it's also based on your knowledge
13 of the industry, right?

14 A. Yes.

15 Q. Now, you know that your stations are
16 available on TuneIn, correct?

17 A. Yes, sir.

18 Q. And I believe you described TuneIn as
19 an aggregator?

20 A. Yes.

21 Q. Have you used in TuneIn?

22 A. Yes.

23 Q. Have you used the TuneIn Website?

24 A. I -- www.TuneIn.com?

25 Q. It's TuneIn.com?

1 A. No.

2 Q. You've not used their Website?

3 A. No.

4 Q. So how do you use TuneIn?

5 A. I use TuneIn through my iPad and
6 iPhone.

7 Q. Okay. And you have an iPad?

8 A. Yes.

9 Q. Okay. So let's talk about how TuneIn
10 works.

11 When you first log into TuneIn, it
12 shows you songs that have just started playing on
13 stations across the country, right?

14 A. Yes, sir.

15 Q. And you can click on a song, and then
16 TuneIn connects you to a stream of that song,
17 correct?

18 A. Yes, sir.

19 Q. And the songs that TuneIn shows you
20 when you log in are personalized to your taste,
21 correct?

22 A. You can personalize them over a period
23 of time by telling TuneIn these are the songs that
24 I like. So yes.

25 Q. And you can search for artists on

1 TuneIn, as we previously discussed, right?

2 A. Sure.

3 Q. And TuneIn will give you a list of
4 stations that are playing that artist's songs,
5 correct?

6 A. At the current time, yes, sir, that
7 have a history of it, yeah.

8 Q. And you can click on all those stations
9 and start hearing that song, right?

10 A. Eventually. I mean wherever the
11 station is in playing that song, so...

12 Q. Sure.

13 Now, if I listen to terrestrial radio,
14 I couldn't go to a single place and click on a
15 button to start hearing a song with a particular
16 artist, correct?

17 A. That's correct.

18 Q. Now, you believe it's not possible to
19 pause on TuneIn, correct? That's in Paragraph 9 of
20 your written rebuttal testimony?

21 A. It's not possible to pause on our
22 streams on TuneIn.

23 Q. Okay. And have you tested that?

24 A. You said on Section 9?

25 Q. It's Paragraph 9 to your written

1 rebuttal testimony.

2 A. Got it. If you pause our stream, you
3 can press a "Pause" button. It doesn't pause and
4 buffer what we do. It pauses your access to the
5 stream. So when you hit "Play," it comes back into
6 whatever it is that we're playing at that time.

7 MR. OLASA: Okay. Well, let's test
8 that out.

9 Can we go to the ELMO. And hopefully
10 the bandwidth gods here will cooperate.

11 BY MR. OLASA:

12 Q. Is this the TuneIn app?

13 A. Yes, sir.

14 Q. And is that Star 94 FM your station?

15 A. Yes, sir.

16 Q. Now let's see about those -- that
17 bandwidth.

18 (Playing music.)

19 All right. Paused the streaming,
20 correct?

21 A. (Witness nodding head.)

22 (Playing music.)

23 It's the same song because we're
24 playing the same song.

25 Q. Did the song continue, or did it

1 buffer?

2 A. I can't hear it particularly well. Now
3 I can hear it.

4 (Playing music.)

5 Q. All right. The screen is paused,
6 right?

7 (Playing music.)

8 JUDGE STRICKLER: Is there any way you
9 can pause it long enough so it can be clear one way
10 or the other whether it's just continuing where you
11 left off or whether they're on to something else.

12 MR. OLASA: Sure. Absolutely. Let's
13 pause it for a little longer.

14 JUDGE STRICKLER: Can you represent how
15 long the song is in terms of minutes, besides being
16 too long?

17 MR. OLASA: It's whatever they're
18 playing right now.

19 JUDGE STRICKLER: Why don't you ask
20 another question and then get back to it.

21 MR. OLASA: All right. We'll come to
22 it.

23 BY MR. OLASA:

24 Q. Let me ask you this: Do you know if
25 you can rewind?

1 A. No.

2 Q. You can't remind?

3 A. Not to my knowledge. I don't use the
4 app to rewind.

5 Q. Now, Mr. Dimick, you testified
6 previously that you're not trying to build a
7 national audience with your stations; is that
8 correct?

9 A. Yes, sir.

10 Q. Well, in that case, why don't you
11 geofence all your stations?

12 A. We do geofence our stations for -- for
13 U.S. with some exceptions about Mexico and the
14 islands, but --

15 Q. So your stations are geofenced to the
16 nation, correct?

17 A. Yes.

18 Q. Well, why don't you just geofence them
19 to the local community?

20 A. For one -- well, there's a couple of
21 reasons.

22 One is that geofencing is not really a
23 precise science. So if you have an IP address
24 that's not registered in our general area --
25 because we don't do location-based addressing; we

1 do IP-based addressing -- if you don't do -- if
2 you're not -- you don't have an IP address that's
3 local into our market, you may not get our market
4 stream. So that's the first one.

5 The second one is that, you know,
6 business people, people that travel in and out --
7 like I mentioned sort of the hurricane deal or the
8 forest fire deal -- if you're in our market or
9 outside our market, you know, to be able to tune in
10 and listen to your hometown radio station is kind
11 of a service that we like to offer.

12 Q. But you have geofenced your Denver
13 country station, correct?

14 A. No. Our Denver oldies station.

15 Q. So you geofenced that station.

16 A. Yes.

17 Q. To the local Denver market?

18 A. Yes, sir.

19 MR. OLASA: Okay. Let's see where we
20 are here.

21 (Playing music.)

22 BY MR. OLASA:

23 Q. So is it still your testimony that you
24 can't pause on a live stream of your stations?

25 A. On my iPad I can't do that, sir.

1 Q. But on this iPad, apparently you can,
2 correct?

3 A. Yeah. That's something new that I've
4 never seen.

5 Q. Could you please turn to Tab 9 in the
6 binder before you.

7 A. Okay. I'm there.

8 Q. And you mentioned earlier that TuneIn's
9 Website is TuneIn.com, correct?

10 A. That was my guess. I've never visited
11 it before.

12 Q. Right.

13 And you see that the Website -- the
14 domain in the URL at the top is TuneIn.com here?

15 A. Yes, sir.

16 Q. So this is TuneIn's Website, right?

17 A. Yes, sir.

18 Q. And can you read the second paragraph
19 of the main text that starts with "Pausing a
20 stream"?

21 A. "Pausing a stream by tapping the pause
22 button suspends the stream, creating a buffering
23 window of approximately 30 minutes. This means the
24 stream can be manually unpaused without losing your
25 place in time provided it's done within a buffering

1 window. If autoresume isn't able to stream live
2 and resume playing, once the buffering window has
3 been reached, if the setting is disabled, the
4 stream will not resume, and TuneIn will disconnect
5 from the stream once the buffering window has been
6 reached."

7 Q. So is it still your testimony that it's
8 not possible to pause on TuneIn?

9 A. Obviously, after seeing this, you know,
10 I was incorrect. But my --

11 Q. And that's a difference between
12 terrestrial station and TuneIn, correct?

13 A. You still -- it is, but you still don't
14 get to choose the contents. I mean you still have
15 30 minutes of whatever we have over the air.
16 Whether you delay it or not, you're going to get
17 commercials; you're going to get whatever it is we
18 play over the air.

19 Q. Do you know if TuneIn allows me to
20 record songs as I'm listening to them?

21 A. I don't, sir.

22 Q. And if TuneIn would low me to record
23 songs, would that allow me to make a catalog of
24 songs using the application?

25 A. Once again, that's asking me to answer

1 a question that I didn't know the answer to the
2 first question. So the second one I would have no
3 idea.

4 Q. Well, let's turn to your testimony
5 Paragraph 9.

6 A. My written testimony?

7 Q. Your written testimony, Tab 2,
8 Paragraph 9.

9 JUDGE STRICKLER: Direct or rebuttal?

10 MR. OLASA: Rebuttal. Tab 2 of the
11 binder.

12 BY MR. OLASA:

13 Q. You say, the second sentence: "But
14 this aggregation does not affect the functionality
15 of our simulcast streams that I have described
16 above," correct?

17 A. Yes.

18 Q. But you don't know if it's possible to
19 rewind, correct?

20 A. No, sir.

21 Q. And you don't know if it's possible to
22 record, correct?

23 A. I have never tried to do it, no.

24 Q. Mr. Dimick, if it's possible to rewind,
25 pause and -- pause and record on TuneIn, does that

1 make it easier for listeners to hear the music they
2 like?

3 A. I don't see how. They still have to
4 listen to what's going on on our over-the-air. I
5 mean it's still our same product. It would be kind
6 of like recording a radio station on a cassette, I
7 guess. You're hearing the same -- you're hearing
8 the product as we present it over the air.

9 Q. For example, if I was a huge fan of
10 Ellie Goulding and decided to start listening to
11 her song but then had something to do, I could
12 pause it and then come back later and finish the
13 song, right?

14 A. According to TuneIn, within 30 minutes.
15 But yes.

16 Q. And if I wanted to record the song, I'd
17 be able to do that as well, correct?

18 A. I don't know how you would do that.

19 Q. Well, let's see.

20 (Playing music.)

21 Is that your station, sir?

22 A. Yes, sir.

23 Q. Does that appear to be a recording of
24 your station?

25 A. Yes, sir.

1 Q. And does that appear to be a recording
2 of your station?

3 A. Yes, sir.

4 Q. So it does appear that I can now record
5 songs I listen to on TuneIn as well?

6 A. It does appear that you can record our
7 radio station, yes.

8 JUDGE STRICKLER: Question for you on
9 TuneIn.

10 Do you know whether a listener can know
11 in advance that a song is going to be playing on
12 your radio station, such that if they wanted to
13 record it, they could record it from the very
14 beginning?

15 THE WITNESS: To my knowledge, there's
16 no way they can know what we're going to play
17 before it starts to play or before we play it.

18 JUDGE STRICKLER: So as far as you
19 understand, if they wanted to record the song,
20 they' have to record it in progress.

21 THE WITNESS: They'd have to be
22 listening to our station and record it as it
23 happened. Because we don't telegraph that
24 information to anybody.

25 JUDGE STRICKLER: Thank you.

1 BY MR. OLASA:

2 Q. Mr. Dimick, you note that the content
3 in your simulcast streams is virtually identical to
4 your over-the-air broadcasts, correct?

5 A. Yes, sir.

6 Q. And you mention that one of the
7 differences though is that you sometimes have to
8 see a preroll when you first start playing the
9 station, correct?

10 A. Yes, sir.

11 Q. And in the demonstration we just had of
12 joining the Ellie Goulding song, was there a
13 preroll?

14 A. No. But I also said, if one is sold,
15 you'd have to see it.

16 Q. And you note that the content on your
17 -- well, you do swap out some ads on your simulcast
18 screen, correct?

19 A. I would imagine, yes.

20 Q. And so you have the ability to -- when
21 you need to, to replace one ad with another ad,
22 correct?

23 A. Well, within certain guidelines of --
24 I'm not trying to like split hairs here. But yeah.
25 I mean --

1 Q. Sure.

2 A. -- within -- I mean a McDonald's ad has
3 to be replaced by a McDonald's ad. It can't be
4 replaced by something else.

5 Q. Sure.

6 I'm -- sorry. Let me ask you a
7 different question.

8 You have the technical capability of
9 replacing one ad on your simulcast stream with
10 another ad?

11 A. Yes. Versus between out of market and
12 in market, yes.

13 Q. So -- and you just mentioned a
14 difference between out of market and in market.

15 So some simulcast users could be
16 hearing one ad, and other simulcast users could be
17 hearing a different ad, correct?

18 A. Yes. In rare circumstances.

19 Q. Now, do you know if it's possible to
20 swap songs in the same way we just discussed,
21 instead of ads, swap songs?

22 A. From a technical standpoint, or is this
23 something that we do?

24 Q. Well, have you ever heard of any
25 broadcaster doing it?

1 A. I haven't. But I mean like making
2 available on an over-the-air stream -- like -- like
3 a simulcast stream, the ability to swap a song?

4 Q. Right.

5 A. Not that I'm aware of. Because over
6 the -- not after TLR. Because total line reporting
7 won't let you do that.

8 Q. Right.

9 But I'm again -- let's just focus on
10 the technical ability to do that for right now.

11 Have you heard of any broadcasters that
12 have the technical ability to swap one song on the
13 simulcast for another song for a different
14 listener?

15 A. Not that I'm aware of, no. On a
16 simulcast, no.

17 Q. And if a broadcaster did have a
18 capability to have some listeners listen to one
19 song and other listeners listen to a different
20 song, would that still be identical to the
21 terrestrial broadcast that you discuss in your
22 testimony?

23 MR. STURM: Objection. He's calling
24 for the witness to speculate on something he
25 doesn't know exists.

1 CHIEF JUDGE BARNETT: Sustained.

2 BY MR. OLASA:

3 Q. Let's change topics. Could you please
4 turn to Tab 1.

5 And this is your direct testimony,
6 right?

7 A. Yes, sir.

8 Q. All right. Let's start with the last
9 paragraph. It's Paragraph 52, on the last page of
10 your direct testimony, just before the signature
11 page.

12 A. Yes, sir.

13 Q. And could you read the last sentence of
14 that paragraph to the court.

15 A. You mean "For the time being"?

16 Q. Yes.

17 A. "For the time being, in my view, the
18 primary beneficiaries of our streams are the record
19 labels who receive the promotional benefit of their
20 music being on our stream while we incur all the
21 associated costs."

22 Q. Right. So let's start with those
23 costs.

24 Do your stations create the music that
25 they play?

1 A. No, sir.

2 Q. So you use music created and funded by
3 artists and record labels, correct?

4 A. By artists and record labels? Yes,
5 sir.

6 Q. And there's a cost associated with
7 creating that music, right?

8 A. I don't have direct experience, but I
9 mean I would assume so, yeah.

10 Q. Right.

11 But you don't discuss that cost in your
12 testimony, correct?

13 A. I would have no knowledge of the cost
14 other than it would exist.

15 Q. And your stations depend on the music
16 provided by record labels and artists, correct?

17 A. It's certainly a component of what we
18 do, yes. I mean, you know, music stations are
19 inherently music. So yeah.

20 Q. Right.

21 So music -- is music one of the primary
22 ways you promote your stations to listeners?

23 A. It's certainly one of the descriptive
24 ways that we use along with morning shows and
25 community service and -- but I would consider it

1 one of the primary ways but not the primary way.

2 Q. And earlier you mentioned that you
3 would love to have some exclusivity in music.

4 Do you recall that?

5 A. Yes, sir.

6 Q. What did you mean by that?

7 A. That means, you know, if you're a fan
8 of Ellie Goulding, and I'm the only radio station
9 in Atlanta that can play it, I'd love to be able to
10 have that.

11 Q. And why would you love that?

12 A. Well, because no other radio station
13 would be able to have it. So, you know, if you
14 like Ellie Goulding, you'd have to listen to us.

15 Q. And would you be able to sell more ads
16 because of that?

17 A. Our ratings would -- well, if Ellie
18 Goulding is as popular as I hope she is, then our
19 ratings would go up, yes.

20 Q. And so having exclusivity, in your
21 view, creates an additional value for you, correct?

22 A. Yes.

23 Q. And a record -- but currently record
24 labels can't give you an exclusive track on your
25 simulcast streams or on or your terrestrial radio,

1 correct?

2 A. Well, I -- like I say, I don't want to
3 -- our simulcast streams are our terrestrial radio.
4 So I just want to be sure I'm not -- I don't want
5 to answer the wrong question.

6 Q. Sure. I withdraw the question.

7 So currently a record label can't give
8 you exclusive access to a tract, correct?

9 A. I don't know if they can't. They
10 don't, at least not to us.

11 Q. Well, you're aware that you -- that
12 radio stations don't need a license to perform
13 music from record companies, correct?

14 A. That's correct.

15 Q. So even if a record label were to try
16 to give you an exclusive track, any other radio
17 station could play that track as well, correct?

18 A. Yes. As soon as it's -- I believe as
19 soon as it's pub -- made public or produced and
20 released.

21 Q. And so that prevents you from tapping
22 into this value exclusivity, correct?

23 A. Yes.

24 Q. Now, earlier, in response to Judge
25 Strickler's questions, you talked about why Lincoln

1 Financial streams.

2 Do you recall that?

3 A. Yes, sir.

4 Q. And Lincoln Financial doesn't have to
5 stream, correct?

6 A. No.

7 Q. And that's a choice --

8 A. There's no law that requires us to
9 currently.

10 Q. So that's a choice that Lincoln
11 Financial has made, correct?

12 A. Yes, sir.

13 Q. And you stream your stations because it
14 provides value to your listeners, right?

15 A. We hope it eventually provides -- the
16 people that are listening, yes. We -- the same
17 thing we have over the air. So we're hoping
18 there's a value there.

19 Q. And that value comes from allowing your
20 listeners to hear your programming anywhere, right?

21 A. Yes. Primarily in our -- I want to be
22 sure that -- primarily in our city of license or
23 our general area. But yeah, they can hear it
24 wherever they are if they're not being blocked by
25 geofencing.

1 Q. Let's turn to Tab 4 in the binder in
2 front of you.

3 A. In the direct testimony?

4 Q. It's just the binder that I handed to
5 you.

6 A. Oh, okay.

7 Q. Do you recognize this document?

8 A. Uh-huh. Yes, sir.

9 Q. And what is this document?

10 A. It's a version of our digital sales
11 playbook we crated in March 2014. We tried to find
12 a business model behind digital that generates
13 revenue.

14 MR. OLASA: Your Honor, I move SX 1579
15 into evidence.

16 MR. STURM: No objection.

17 CHIEF JUDGE BARNETT: 1579 is admitted.

18 (SoundExchange Exhibit No. 1579 was
19 admitted into evidence.)

20 BY MR. OLASA:

21 Q. Mr. Dimick, could you please turn to
22 Page 7 of this document. And I'm talking about the
23 same numbers at the bottom. It's SX 1579-007.

24 A. Okay.

25 Q. Do you agree that streaming positions

1 Lincoln to best meet the needs of its increasingly
2 digital audiences?

3 A. Can I have a second to --

4 Q. Yes.

5 A. I'm familiar with the document, but
6 give me a second.

7 And I'm sorry. Would you ask the
8 question again.

9 Q. You would agree that streaming
10 positions Lincoln to best meet the needs of its
11 increasingly digital audiences, right?

12 A. I would agree that having a digital
13 presence best helps Lincoln meet its needs. But
14 digital is streaming and more.

15 Q. Okay. And digital includes streaming;
16 is that your testimony?

17 A. Yes. I mean it's on our pages. So
18 yes.

19 Q. And your audience and your advertisers
20 are moving online, and Lincoln wants to keep up,
21 correct?

22 A. Yes.

23 Q. And that was the hockey puck analogy
24 you -- you --

25 A. Yes. You want to skate to where the

1 puck is eventually, yes.

2 Q. Got it.

3 Okay. So let's took at some of the
4 specific numbers that you previously discussed with
5 counsel.

6 And this is where, if you need to get
7 to anything restricted, we can clear the courtroom.
8 But I'm going to try and do it in public session.
9 So I think we'll --

10 A. So you're talking about back in my
11 direct testimony?

12 Q. This is Tab 1, your written direct
13 testimony. And it's Page 12.

14 A. Okay.

15 Q. Right.

16 And I just want to make sure -- just
17 focusing on this table, I just want to make sure I
18 understood your testimony earlier and that the
19 Court understood it as well.

20 The streaming revenue column on the
21 left, that includes preroll ads and insertions,
22 correct?

23 A. Spot insertions, yes.

24 Q. Okay. Nothing -- that column does not
25 include any revenue earned through Nielsen total

1 line reporting, correct?

2 A. That's correct. I mean especially in
3 2013 when we didn't do it.

4 Q. So at least for the 2014 numbers, after
5 you started total line reporting, the numbers on
6 the left-most streaming revenue column, those are
7 just preroll ads and stream insertions, correct?

8 A. Yes. Whatever could be directly
9 attributed to the stream.

10 Q. So if a listener to a simulcast stream
11 of one of your stations heard, say, ten ads that
12 day, no revenue associated with those
13 advertisements are in that column, correct?

14 A. Yes, sir. But no expense associated
15 with those is in the other one.

16 Q. Right. But that wasn't my question.
17 My question was about the revenues.

18 So am I correct to say that there are
19 no revenues associated with that listener -- a
20 listener who heard the same ads that you broadcast
21 from the terrestrial station on the simulcast
22 stream, there's no revenue associated that user in
23 this column?

24 A. No, sir.

25 Q. Am I incorrect?

1 A. No, no. You're -- I'm sorry. You are
2 correct.

3 Q. Thank you.

4 A. Yeah. There's no money associated with
5 that.

6 JUDGE STRICKLER: Quick question for
7 you.

8 What percent of the total listeners on
9 the stations that are listed here in this chart, if
10 you know, approximately, constitute simulcast, that
11 is to say Web listeners on the simulcasting out of
12 the total number of --

13 THE WITNESS: So go back and look at
14 the Nielsen TLR reports. I mean smaller than
15 one-tenth of 1 percent of the available population.
16 That's what that --

17 JUDGE STRICKLER: That's the --

18 THE WITNESS: Are you talking about our
19 -- availability of -- our size --

20 JUDGE STRICKLER: Yeah. Your actual
21 listeners. So turn it around. Actual listeners
22 come from terrestrial listening, and what percent
23 come from listening on the Web with regard the
24 simulcast.

25 THE WITNESS: Rough estimate, without

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1 having to go in and hand calculate it, 99 percent
2 over the air and 1 percent streaming, maybe in some
3 cases 2, depending on whether you measure what we
4 consider Cume or average quarter hour. But it's a
5 small percentage.

6 JUDGE STRICKLER: Thank you.

7 BY MR. OLASA:

8 Q. And I'm not sure this is something you
9 can answer in public session.

10 But what is Lincoln Financial Media
11 Company's total advertising revenue for 2014?

12 A. Yeah. That's --

13 Q. Something you can't -- okay.

14 A. No. I mean it's not as big as I'd like
15 it to be. But, you know...

16 Q. Let's -- we'll hold that question.
17 I'll get to it at the end so we don't have to break
18 things up.

19 So turning to the second column,
20 "SoundExchange Recording Royalties Paid."

21 Do you see that?

22 A. Yes, sir.

23 Q. And those are the royalties you pay on
24 a per screen basis to your listeners, correct?

25 A. Yes, sir.

1 Q. So for each sound recording you
2 transmit, there's a royalty associated with it, and
3 that's the total amount for each station in that
4 column?

5 A. Like, as an example, WLYF, that number
6 there is the total that we paid for 2013.

7 Q. And so that number indicates that
8 people are, in fact, listening to your simulcast
9 streams, correct?

10 A. Yes, sir.

11 Q. So in 2014, Lincoln switched to Nielsen
12 total line reporting, right?

13 A. Yes, sir.

14 Q. And total line reporting allows you to
15 report your simulcast and terrestrial broadcasts as
16 a single combined set of ratings, correct?

17 A. Yes. I mean there's a subsonic code
18 you can't hear that's picked up by the metering
19 system that you can simulcast instead of having to
20 generate it separately.

21 Q. And you note in your testimony that
22 this measurement -- this total line reporting
23 measurement system is endorsed by the Media Ratings
24 Council, correct?

25 A. Yes. It's approved by the Media

1 Ratings Council.

2 Q. Well, does the Media Ratings Council
3 endorse any specific methods of measuring
4 listenership?

5 A. I'm not sure I understand.

6 The Media Ratings Council is just a
7 body that determines whether their ratings are
8 accurately reflected. I mean it meets all the
9 statistical and mathematical standards for ratings
10 to be considered accurate.

11 Q. Well, let me -- maybe I can make this a
12 little more clear.

13 Please turn to Paragraph 19 of your
14 testimony, your direct Tab 1.

15 A. Okay.

16 Q. In the middle of Paragraph 19, there's
17 a sentence: "Nielsen TLR has strict compliance
18 requirements and has been endorsed by the Media
19 Ratings Council."

20 Do you see that?

21 A. Yes.

22 Q. And you've been on the board of the
23 Media Ratings Council, correct?

24 A. Yes.

25 Q. And when you use the word "endorse,"

1 what do you mean?

2 A. That The Media Ratings Council has said
3 that the Nielsen TLR compliance requirements are
4 accurate.

5 Q. Have they accredited the Nielsen TLR
6 measurement system?

7 A. Not to my knowledge. But I don't think
8 that -- that Nielsen would be after a TLR -- an MRC
9 TLR accreditation. They've accredited the ratings.
10 MRC's accredited the ratings in most markets that
11 Nielsen generates.

12 Q. Are you aware that Nielsen -- sorry.
13 You're aware that MRC has accredited
14 Triton Webcaster metrics, correct?

15 A. Yes.

16 Q. And that's what Pandora uses to measure
17 its streaming audience, correct?

18 A. I have no idea what Pandora uses to
19 measure streaming audience.

20 Q. But you are aware that Triton Webcaster
21 metrics have been accredited by the Media Ratings
22 Council?

23 A. Yes.

24 Q. And could you tell the Court what
25 "accreditation" mean?

1 A. Accreditation means that basically
2 there's been a thorough investigation of your
3 methodology for surveying audience size and that
4 you meet those requirements.

5 Q. And your stations don't use Triton's --
6 Triton's Webcaster metric system, correct?

7 A. We don't sell from it. Our sales reps
8 use it. We use it internally -- you know, some of
9 the people use it internally to find out how the
10 streams are going.

11 But our sales people -- they can't
12 marry it with Arbitron, so --

13 Q. Okay.

14 A. Excuse me. With Nielsen. Sorry.
15 There's been a name change recently in the company.

16 Q. Mr. Dimick, you switched to total line
17 reporting because you believe it will eventually
18 allow you to command higher prices for your
19 advertising, right?

20 A. Yes, sir.

21 Q. And you believe that, over time,
22 advertisers will become more accustomed to total
23 line reporting, correct?

24 A. Well, and also, you know, we switched
25 to total line reporting because it allowed us to

1 improve the product experience of our listener as
2 well, without having this choppy stuff that stops
3 it.

4 And you -- and your follow-up question
5 was? I'm sorry.

6 Q. So -- and you also believe that, over
7 time, advertisers will become more accustomed to
8 ratings of simulcast streams, correct?

9 A. Because our ratings are reflective of
10 simulcast now.

11 Q. Well, in your testimony you mentioned
12 that measuring simulcasts is still a nascent
13 industry, correct?

14 A. Yes.

15 Q. And so over time you'd expect this
16 industry to stabilize and no longer be a nascent
17 industry, correct?

18 A. I would hope, yes.

19 Q. And at that time, you think that the
20 measurements would be more accepted by advertisers,
21 correct?

22 A. I would imagine so over time, yes.

23 Q. Mr. Dimick, when you stream a station,
24 Lincoln, you don't have to register the music,
25 correct?

1 A. No. No, you don't.

2 Q. So you don't require your users to
3 provide demographic information, right?

4 A. No, we don't.

5 Q. So you don't require a ZIP code or an
6 age or a sex, right?

7 A. We ask for it when you visit our
8 Websites to become a loyal listener member. But
9 not to -- you can access the stream directly.

10 Q. Are you aware that Pandora collects
11 this information?

12 A. Yes.

13 Q. And are you aware that Pandora uses
14 this information to target its ads to users?

15 A. I could -- I would have no idea about
16 that. It would make sense, but I don't know what
17 Pandora does. I mean for how it -- I know they
18 gather the information. I don't know what they do
19 with it.

20 Q. Can you turn to Tab 5 of the
21 testimony -- of the binder in front of you.

22 A. Yes, sir.

23 Q. Have you seen this document before?

24 A. Yes. It was in my files.

25 MR. OLASA: Your Honor, I move to admit

1 SX 1605 into evidence.

2 MR. STURM: No objection.

3 CHIEF JUDGE BARNETT: 1605 is admitted.

4 (SoundExchange Exhibit No. 1605 was
5 admitted into evidence.)

6 BY MR. OLASA:

7 Q. And this document discusses how Pandora
8 uses registration information to target listeners,
9 correct?

10 A. Do you have a specific page, or is
11 it --

12 Q. We'll have you -- I'll have you turn to
13 Page 12, SX 1605-12.

14 A. Okay. Yes.

15 This is a document that was prepared by
16 someone else that we circulated. So I have it, but
17 I'm not intimately familiar with it.

18 Q. Does this document refresh your
19 recollection that Pandora is able to target its
20 listeners by location and demographics?

21 MR. RICH: Objection.

22 THE WITNESS: Sure.

23 MR. RICH: There's no foundation that
24 this witness knows the facts. And he already said
25 it was created by a third party, and he's read it.

1 CHIEF JUDGE BARNETT: Sustained.

2 MR. OLASA: I withdraw the question.

3 No further questions.

4 Oh, sorry. Can we clear the courtroom
5 for that last question that I withheld on revenues?

6 CHIEF JUDGE BARNETT: Oh, yes, you may.

7 If you're in the hearing room and you
8 have not signed the nondisclosure, will you please
9 wait outside for this one question.

10 (THIS ENDS PUBLIC SESSION)

11 (RESTRICTED SESSION BOUND SEPARATELY)

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Capital Reporting Company
Day 21 In Re: Determination of Royalty Rates (Public) 05-26-2015

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1 (THIS BEGINS PUBLIC SESSION)

2 CHIEF JUDGE BARNETT: Please be seated.

3 I believe we have seen you in this proceeding
4 before.

5 THE WITNESS: I believe you have.

6 CHIEF JUDGE BARNETT: You remain under
7 oath.

8 THE WITNESS: Very good.

9 CHIEF JUDGE BARNETT: Mr. Choudhury.
10 DAVID BLACKBURN,
11 having been previously duly sworn, to tell the
12 truth, the whole truth and nothing but the truth,
13 testified as follows:

14 DIRECT EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE

15 BY MR. CHOUDHURY:

16 Q. Dr. Blackburn, welcome back.

17 A few weeks ago, we talked about your
18 work in the direct phase in this matter. I
19 understand you've also provided testimony in the
20 rebuttal phase of this matter; is that correct?

21 A. That's correct, yes.

22 Q. Again, you prepared some slides for
23 your presentation, correct?

24 A. I did.

25 Q. Can you now explain to the judges what

1 your assignments were in the rebuttal phase of the
2 matter?

3 A. Sure. There were a few things. I was
4 asked to analyze and respond to the assertions in
5 Dr. McBride's written testimony relating to whether
6 or not Pandora serves as expansionary -- whether it
7 serves a promotional role or a substitution role
8 to other industry revenues, as well as some
9 assertions made by other Pandora witnesses and
10 other witnesses from the services along the same
11 lines, so that involved looking at the work that
12 Dr. McBride did, as well as looking at some other
13 data that had been produced in the matter.

14 I was also asked to look at some
15 information on the distribution of the performances
16 that are played by Pandora in response to claims by
17 Mr. Westergren that -- I believe what he testified
18 was that 80 percent of the artists that Pandora
19 plays don't receive any terrestrial air time.

20 And I was asked to discuss the role
21 that nonlicense services' piracy has in the
22 decisions that are made by record companies and the
23 director license services and how that might relate
24 to the negotiations between them.

25 Q. Now Dr. Blackburn, there is a lot of

1 text above the slide. Are we going to cover all of
2 these topics this afternoon?

3 A. No, as I believe the intention is to
4 just talk about what is in yellow there.

5 Q. The other topics are addressed in your
6 written rebuttal testimony?

7 A. That's correct.

8 Q. If you could turn to Tab 1, please, in
9 the binder in front of you.

10 Dr. Blackburn, what is this?

11 A. It is a copy of my written rebuttal
12 testimony.

13 Q. If you could turn to Page 38.

14 A. Okay.

15 Q. Is that your signature?

16 A. It is.

17 Q. Now, Dr. Blackburn, since the time that
18 you filed your written rebuttal testimony, have
19 your opinions changed in any way?

20 A. So the one thing that has happened is
21 Dr. McBride came here and gave some testimony, and
22 in doing so, which I reviewed the transcript of, in
23 doing so, talked about some of the claims that I
24 made about data being dropped -- about some things.

25 One of those things was data being

1 dropped from his analysis and he testified that
2 there are some other reasons besides experiments
3 having no sales that led him to leave some of the
4 experiments that he didn't analyze in his
5 regression analysis, his TMLE analysis for the
6 music sales experiments that were due to, for
7 example, like he said there were like seven that
8 didn't have any spins, and you can't analyze those.

9 And so -- no, I take that
10 representation that that may be true, so it may be
11 that the number that is in my report here as to how
12 many were dropped because of that reason, that
13 might not be the right number, might be somewhat
14 less than that, but it doesn't change the
15 underlying opinion that goes along with that, that
16 there were data that were dropped and that -- I
17 don't think Dr. McBride, I don't think contested
18 the fact that he dropped some data from his
19 analysis just because it had zero sales and that it
20 is improper to do so, so the opinion itself -- the
21 theme of the opinion there is unchanged but it may
22 be that the specific number of how many were
23 dropped for that reason is not what I initially
24 thought it might have been.

25 MR. MARKS: Objection, Your Honor. I

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1 don't believe the witness intended to suggest that
2 Dr. McBride conceded that excluding experiments
3 with zero sales was improper. I think the way it
4 came out on the transcript, it makes it look -- I
5 believe he is testifying that it's his view that
6 it's improper, not that he's ascribing to
7 Dr. McBride any kind of concession or agreement
8 that -- on the part of Dr. McBride that it's
9 improper to do so.

10 THE WITNESS: Right. So actually what
11 I meant to say is that I think Dr. McBride -- let's
12 say he didn't deny that some were dropped for that
13 reason, and I -- my opinion continues to be that
14 that is improper.

15 MR. MARKS: That clarifies.

16 CHIEF JUDGE BARNETT: Thank you.
17 Sustained. I think the record is now clear.

18 BY MR. CHOUDHURY:

19 Q. And with that one modification, is your
20 testimony true and correct?

21 A. Yes, I believe so.

22 MR. CHOUDHURY: Your Honor, at this
23 time, we would move in SoundExchange Exhibit 24.

24 MR. MARKS: No objection from Pandora.

25 CHIEF JUDGE BARNETT: Exhibit 24 is

1 admitted.

2 (SoundExchange Exhibit 24 was admitted
3 into evidence.)

4 BY MR. CHOUDHURY:

5 Q. Dr. Blackburn, can you summarize what
6 you determined about Dr. McBride's music sales
7 experiments?

8 A. So, you know, I think there is three
9 main points, so one -- so in my opinion, Dr.
10 McBride's analysis just analyzed the wrong
11 question. So it's an analysis of whether or not
12 Webcasting -- whether or not Pandora is promotional
13 to individual tracks as opposed to whether or not
14 Webcasting or Pandora in general is promotional to
15 the industry. So I think -- I think that is one of
16 the main points.

17 The second is what we had talked --
18 what I just talked about, that he excludes data
19 from his analysis that specifically demonstrates a
20 lack of promotion and doesn't include them in the
21 work that he does. I think that was improper.

22 And third, there are issues in his data
23 that raise fundamental questions about the
24 randomness of the experiment, the randomization of
25 the experiments, and then the inferences that one

1 draws from what he did.

2 JUDGE STRICKLER: Question for you,
3 Dr. Blackburn. Good afternoon.

4 THE WITNESS: Good afternoon.

5 JUDGE STRICKLER: In what you -- I
6 think -- to what you just said, was a reference to
7 Page 4 of your rebuttal testimony when you say that
8 Dr. McBride was not looking at the pure effect of
9 overall music sales, but rather, the substitution
10 effect between songs.

11 Is that the point you were making?

12 THE WITNESS: That's correct, yes.

13 JUDGE STRICKLER: So are you saying
14 that you understand Dr. McBride's music sales
15 experiments to show that there is this substitution
16 -- I hate to say it, this promotional effect
17 between songs but not an overall promotional effect
18 that grows the pie of total songs played?

19 THE WITNESS: Well, sir, I think there
20 is flaws in the analysis that he conducted, so
21 putting aside the question of whether he is asking
22 the right question, I think there are flaws, and I
23 think we plan to talk about them a little bit, in
24 the analysis that he did, that raises doubts about
25 the ability to draw the inferences that he claims

1 to have drawn, but in addition to that as well, if
2 you accept that those are -- that his analysis is
3 right just for the sake of argument, so if I were
4 to accept that what he shows is, in fact, correct,
5 and that these other problems don't exist, what I'm
6 saying is I think that is the wrong question so it
7 doesn't answer the question of, does the existence
8 of a statutory license to the industry, is that a
9 good thing or a bad thing to other industry revenue
10 sources, it just doesn't speak to that at all.

11 It speaks to the question of whether
12 Pandora by playing one artist more and another
13 artist less, can shift sales of purchases that are
14 happening anyway from one or to another as opposed
15 to asking the question, by having Pandora and
16 having people listen to Pandora, does that actually
17 cause there to be more sales of artists generally.

18 JUDGE STRICKLER: So if we think of it
19 in terms of pie, leaving aside your criticism that
20 will come from all the other flaws that you see in
21 what he did, you are saying that in any event, he
22 asked the wrong question because he is just
23 demonstrating, according to your testimony, that
24 the pie gets redistributed depending on how much
25 music gets played, the pie being the sale of sound

1 recordings, rather than enlarging the total pie or
2 sound recordings.

3 THE WITNESS: That's right. So I think
4 what he -- again, putting aside the other
5 criticism, what he did was show that when artists
6 were turned on in his experiments, those artists
7 got a slightly bigger share of the pie but it
8 doesn't say anything about whether the pie itself
9 is bigger.

10 JUDGE STRICKLER: Does even that narrow
11 conclusion relate in any way to the value of an
12 attempt to steer recordings towards one record
13 company versus another?

14 THE WITNESS: Sorry. Can you --

15 JUDGE STRICKLER: Yeah. You know what,
16 let's hold off on that.

17 THE WITNESS: Okay. Very good.

18 BY MR. CHOUDHURY:

19 Q. Just so we are clear, can you -- and
20 you used the terms expansionary and diversionary
21 promotion in your testimony.

22 Can you explain what you mean by that
23 in relation to Judge Strickler's question?

24 A. Sure. So when I use the term
25 expansionary promotion, I am talking about this

1 growing pie, right.

2 So expansionary promotion is some sort
3 of promotion that leads to additional sales for
4 whatever is being promoted, but does so by growing
5 the industry, making the pie bigger, and without
6 taking it out of anybody else in the industry's
7 hide, whereas diversionary promotion, when I talk
8 about diversionary promotion, I'm talking about
9 promotion that might increase the sales of one
10 artist or one portion of an industry, but those
11 increased sales are diverted away from somebody
12 else in the industry, so I get made better off as a
13 result of the promotion that I did, but I'm only
14 better off because somebody else is worse off.

15 Q. And which of those two do you regard as
16 the relevant question here?

17 A. So I think that expansionary promotion
18 is the relevant question. You know, at the end of
19 the day, the proceeding is about setting a license
20 for, you know, a statutory license for all recorded
21 music, and then the question of whether or not that
22 license -- whether or not the rights granted by
23 that license are -- lead to some promotion to other
24 revenue streams, I think the right way to think
25 about it is whether that leads to additional

1 benefits, additional profits, additional revenues
2 from other streams to the whole industry.

3 I mean, another way to think about it
4 is, there is no such thing as diversionary
5 promotion when we are looking at a license for the
6 whole industry, right, because at that point, it's
7 the whole industry. The only type of promotion
8 that can exist is expansionary. Anything that
9 makes one guy better off while making somebody else
10 worse off is just shifting the -- giving me a
11 slightly bigger slice of pie and giving you a
12 slightly smaller slice.

13 MR. CHOUDHURY: Your Honor, at this
14 point, we're going -- we need to go into restricted
15 session to talk about these specific documents.

16 CHIEF JUDGE BARNETT: Okay. For those
17 of you in the courtroom who are not signatories of
18 a nondisclosure certificate, please wait outside.

19 MR. MARKS: I would just ask whether or
20 not this is going to be restricted as to Pandora
21 information or iHeart so that our client could stay
22 if it is Pandora information.

23 MR. CHOUDHURY: It will be both. At
24 first, it will be Pandora, then iHeart, so if you
25 want, I can do a buddy signal.

1 MR. MARKS: We would appreciate that if
2 it doesn't interrupt your examination.

3 MR. CHOUDHURY: Sure. I'm happy to do
4 that. So we will start with Pandora.

5 (THIS ENDS PUBLIC SESSION)

6 (RESTRICTED SESSION BOUND SEPARATELY)

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Capital Reporting Company
Day 21 In Re: Determination of Royalty Rates (Public) 05-26-2015

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1 (THIS BEGINS PUBLIC SESSION)

2 BY MR. CHOUDHURY:

3 Q. Dr. Blackburn, can you tell us what
4 analysis you did with the Tracker data?

5 A. So I looked at what happened -- so the
6 Tracker data -- I have to describe it a little bit.
7 The Tracker data tracks individual machines and
8 what people do on those machines.

9 And so what the -- this is data that
10 was produced by iHeart initially with Professor
11 Danaher's report. And then there was a revised
12 version of the data produced with his corrected
13 report. And so that's -- this is the data that I
14 analyzed.

15 And what it represents is the amount of
16 visits -- the number of visits that the users of
17 the machine made to various music streaming sites,
18 both statutory, noninteractive sites and
19 interactive sites. So things like Pandora and
20 iHeart on the one hand and Spotify on the other, as
21 well as the purchases that were made of digital
22 tracks on that machine. And it's done monthly. So
23 there's a six-month period of data that -- where
24 this stuff is tracked.

25 And so then what I did is look at that

1 data and see -- look at the first three months of
2 the data versus the second three months of that
3 data. So sort of conducted before-and-after
4 analysis of whether or not -- when people start
5 using one of these services, both interactive
6 services and noninteractive services, see whether
7 or not there's a change in what would be predicted
8 by their -- I'm sorry -- whether or not there's a
9 change in what you would predict in their purchases
10 of music.

11 So it's looking only at digital
12 purchases. So obviously it doesn't track if you
13 purchase a CD or whether you're spending money on
14 subscription services or anything like that. It's
15 just looking at the effect on digital downloads.

16 And it's limited to computer-based
17 usage. So it doesn't involve mobile users. So
18 it's only looking at people who are using these
19 services on a computer, a laptop or a desktop, that
20 the tracking software is installed on.

21 And what we did then is look to see, as
22 I said, whether or not there's a change in
23 purchasing patterns when people start using one of
24 these services.

25 The thing to keep in mind about this is

1 that there's a -- there's going to be a bias in
2 this data, right?

3 So the data, when you use it this way,
4 what you like to have is people sort of just
5 discovering these events -- you know, discovering
6 that Pandora exists, right? And they didn't know
7 about it before, and so this is like an exogenous
8 change in the world to them, and now Pandora
9 exists, and they start using Pandora and what
10 happens to their purchasing patterns.

11 Same thing for Spotify. They don't
12 know about Spotify. They discovery Spotify, start
13 using Spotify. What happens to the sales -- what
14 happens to their purchase of digital downloads
15 after that?

16 The problem is the data only allows you
17 to identify that they weren't using it previously,
18 and then they were using it later.

19 So some of those people are going to be
20 actual discovery events like I -- you know, that I
21 just described. So what you see is an actual
22 change in purchasing behavior that's induced by
23 becoming aware of and beginning to use these
24 services.

25 But there's going to be some changes

1 there in purchasing patterns and usage that happens
2 not because the service is discovered but because
3 something else changed. And, you know, they wake
4 up in the morning, and they're in a better mood,
5 and they feel better about music, and so they start
6 buying more songs and listening to services that
7 they weren't listening to before.

8 And those people, if you just look at
9 this analysis, would look like, hey, there's more
10 purchases at the same time that they start using
11 these services, whether interactive or
12 noninteractive. And you would say, "Well, that's
13 evidence of promotion."

14 But that's -- those people are not
15 actually evidence of promotion. And there's no way
16 to separately identify them from the people for
17 which it really is a change in the world when they
18 learn about and start using these things.

19 And so this type of analysis has the
20 flaw that it's going to be biased in favor of
21 finding a positive relationship between the
22 discovery and use of these services and an increase
23 in sales. So that is it's going to be biased in
24 favor of seeing something that looks like
25 promotion.

1 Q. And, Dr. Blackburn, in conducting this
2 analysis, did you review any of Dr. Danaher's
3 reports in this matter?

4 A. I did. I had to. So the data were
5 turned over with his reports. And his reports
6 describe the source of the data and what the
7 variables are and things like that.

8 Q. And if you could turn to Tabs 2 and 3.
9 Are those each reports that you
10 reviewed and relied upon in conduct your analysis?

11 A. That's right. Those are those reports.

12 MR. CHOUDHURY: Your Honor, at this
13 time we'd move in SoundExchange 288 and
14 SoundExchange 2184.

15 MR. MILLER: We object to the admission
16 of either of those exhibits.

17 CHIEF JUDGE BARNETT: Seems to me that
18 we've visited and revisited this issue.

19 Is there something different, Mr.
20 Choudhury?

21 MR. CHOUDHURY: Yes, Your Honor. In
22 this instance, this is -- what we revisited is
23 whether Dr. Kendall had reviewed this.

24 But this is actually material that
25 Dr. Blackburn reviewed and relied upon in making

1 his rebuttal testimony. We think that's separate
2 from the issues that were briefed by the parties.

3 CHIEF JUDGE BARNETT: Just because
4 it's -- he reviewed it and relied upon it does not
5 make it admissible.

6 MR. CHOUDHURY: Well, that's correct,
7 Your Honor. But, you know, to the extent that this
8 is material that he is familiar with and he's
9 testified to, I think Your Honor has admitted other
10 evidence that experts have reviewed and relied
11 upon. And he's described here in his testimony how
12 this informs the analysis he did.

13 CHIEF JUDGE BARNETT: But the other
14 evidence that we allowed in that experts had
15 reviewed and relied upon is not testimony from a
16 witness who has been withdrawn from the case and
17 who is not going to be available for
18 cross-examination or otherwise.

19 MR. CHOUDHURY: Well, Your Honor, we'll
20 withdraw the offer subject to the pending motion.

21 CHIEF JUDGE BARNETT: Okay. Thank you.

22 BY MR. CHOUDHURY:

23 Q. So, Dr. Blackburn, when you were here
24 last time, you were asked a number of times by
25 counsel if you conducted a regression.

1 So I'm going to go ahead and save some
2 time and ask you at this time did you conduct a
3 regression?

4 A. I did, yes.

5 Q. Can you tell us what did you find?

6 A. So if you -- if we look at Slide 11,
7 this is an excerpt from -- this is part of a table
8 that's in my written rebuttal testimony that shows
9 the output of this regression when you look at
10 everybody who's a music streamer.

11 And what you can see, the coefficients
12 of interest are the ones for noninteractive user
13 period 2 and interactive user period 2.

14 And what you can see there is that both
15 those coefficients -- so this is the additional
16 songs purchased over the three months that would be
17 due to becoming a noninteractive user in the first
18 instance or becoming an interactive service user in
19 the second instance.

20 Again, keeping in mind the caveat that
21 these numbers are going to be biased upwards in
22 terms of interpreting this as promotion to the
23 extent that some of this is -- some of these
24 numbers are being driven by the fact that, you
25 know, there's just some other things that are

1 changing in the world between period 1 and period
2 2.

3 And so, if we move to Slide 12, I mean
4 there's a -- and these are summaries, to
5 understand, of what the results show, but I think
6 there's two things.

7 One is, if you look at -- just look at
8 what's the -- what evidence is there of a
9 promotional effect -- and keep in mind. This is --
10 this is a test of diversion -- sorry -- of
11 expansionary promotion, right?

12 So this is -- it's limited just to
13 download. So it's not a true test of expansionary
14 promotion in that there's other revenue streams
15 that would be relevant for a test of expansionary
16 promotion.

17 But this is a test of expansionary
18 promotion on downloads. Because we're looking at
19 changes in total downloads purchased on these
20 machines after they become an interactive user -- a
21 user of an interactive service or a user of a
22 noninteractive services.

23 And so, if you look at the
24 noninteractive service coefficient, that
25 coefficient is small. So it's less than one song

1 over three months. And that is not statistically
2 significant.

3 So, you know, you can't reject -- you
4 can't prove a negative, right? You can't prove
5 that it's equal to zero, that there's no
6 promotional effect.

7 But what you have here is, you know, no
8 evidence that there is a promotional effect, right?
9 This is as -- consistent with being net
10 substitutional. It's consistent with it being
11 neutral. And it's consistent with it being
12 somewhat -- somewhat promotional.

13 So you can't rule out any of those
14 things. So just -- there's no evidence here
15 that -- this doesn't provide anything to make you
16 look at it and say the noninteractive services are,
17 in an expansionary sense, promotional.

18 And then the other thing is, if you
19 look back, you see something very similar for the
20 coefficient on the interactive services, right? So
21 the Spotifies of the world. And you can run a T
22 test -- an F test on those two coefficients to say
23 whether or not they are -- they're different from
24 each other, right, or whether or not the
25 noninteractive services are more promotional or

1 less substitutional than the interactive services
2 are.

3 And what you find is you get a pretty
4 high P value, .35, which is well above, you know,
5 any level that anybody would claim to represent a
6 statistically meaningful difference between the
7 two.

8 So again, there's no evidence here --
9 or the evidence here just doesn't support the claim
10 that the interactive -- the noninteractive services
11 are more promotional than the interactive services.

12 MR. CHOUDHURY: Thank you,
13 Dr. Blackburn.

14 No further questions at this time.

15 CHIEF JUDGE BARNETT: Thank you.

16 CROSS-EXAMINATION BY COUNSEL FOR PANDORA

17 BY MR. MARKS:

18 Q. Hello again, Dr. Blackburn.

19 A. Hello.

20 Q. The terms "expansionary promotion" and
21 "diversionary promotion" are not terms that one
22 would find in an economics textbook, correct?

23 A. Yeah. I mean I don't know. You may.
24 I didn't take them from an economics textbook.

25 Q. And you're not familiar with any

1 peer-reviewed articles in the field of economics
2 that discuss the topic of expansionary or
3 diversionary promotion, right?

4 A. Off the top of my head, no.

5 Q. I'd like to revisit a few of the
6 hypotheticals that we discussed at your deposition.

7 So first, assume with me, if you would,
8 that all of the goods in a market yield the seller
9 equal rates of profitability.

10 Are you with me?

11 A. Okay.

12 Q. And if that market has a single
13 monopolist seller, the seller would care -- would
14 only care about what you have labeled expansionary
15 promotion and would not care about diversionary
16 promotion, correct?

17 A. I mean I think that's right. If --
18 whether they sell -- you know, there's two
19 products, product A and product B, and they yield
20 exactly the same profit per unit. If you did
21 something that shifted some sale of B over A, you
22 know, maybe there's some long-run consideration.

23 But I think that's not -- you know,
24 that's not what we're talking about. It's just in
25 a simple case. It doesn't matter whether I sell

1 ten of A and zero of B or zero of A and ten of B.

2 Q. And if that same market, instead of
3 having a single monopolist seller, is instead a
4 competitive market with multiple sellers, you would
5 expect those sellers to care about both
6 expansionary promotion and diversionary promotion,
7 correct?

8 A. Well, right. I mean firms conduct
9 diversionary promotional tactics all the time,
10 right? I mean Coke spends lots of money going
11 around convincing people to buy Coke instead of
12 Pepsi.

13 Q. And assume with me that there is a
14 music service that is neither promotional nor
15 substitutional to recording industry revenues as a
16 whole, but air play on that music service affects
17 the split of industry-wide revenues earned by each
18 record label.

19 Are you with me?

20 A. I think so.

21 Q. In that situation, as an economist, you
22 would expect that record labels would compete to
23 increase their share of air play on that service,
24 right?

25 A. Right.

1 So if the service is expansionarily --
2 if that's a word -- neutral, and by getting played
3 more on that service, you could get more sales of
4 your stuff, and that would be drawn away from
5 somebody else's stuff, that would be good for you.

6 Q. And you would expect record labels to
7 compete for air play on the service if that were
8 the result.

9 A. I would expect them to want to be
10 played more, yes.

11 Q. And your analysis of net promotion in
12 your written rebuttal testimony does not
13 distinguish between major record labels on the one
14 hand and independent record labels on the other in
15 any aspect, does it?

16 A. No. So the analysis we were just
17 talking about looks at total sales. Doesn't matter
18 whose albums were -- or songs were purchased.

19 Q. I'd like to discuss some of the figures
20 in your written rebuttal testimony that we didn't
21 discuss but that are in the written testimony that
22 was admitted into evidence.

23 We spent quite a bit of time during
24 your testimony, as part of SoundExchange's direct
25 case, discussing factors other than noninteractive

1 Webcasting that have contributed to the decline in
2 recording industry revenues over time.

3 Do you recall that?

4 A. I do.

5 Q. And just -- I'll try to keep this
6 brief.

7 In connection with your written
8 rebuttal testimony, you did not do any analysis to
9 figure out what portion of the decline in the
10 recording industry revenues between 2008 and 2013
11 is attributable to the ongoing effects of record
12 piracy, for example, right?

13 A. So I think that's true. I mean there's
14 a discussion of piracy in my written rebuttal
15 testimony, but it's about how that affects the
16 licensing deals for directly licensed services. So
17 as long as we're excluding that --

18 Q. Right.

19 A. -- I think that's right, yes.

20 Q. Okay. And indeed, you concluded that,
21 despite the industry's efforts to combat music
22 piracy, the threat from pirated music is, in your
23 view, likely to strengthen and not dissipate over
24 time, correct?

25 A. That's right. I think the threat is as

1 strong a threat as ever as the -- the sort of
2 Napster generation grows up and sort of replaces in
3 the market people who are not part of the Napster
4 generation.

5 I'm not sure that actually piracy is
6 bigger than it was before. I think, because the
7 services here and directly license services and the
8 availability of downloads and stuff like that, I
9 think there's been a change in what the industry
10 has offered to consumers that has made piracy less
11 active, is maybe the word I would use.

12 But I think the threat of piracy is
13 still very real because there's a lot of consumers
14 out there, the greater share of consumers out
15 there, who view piracy as, for lack of a better
16 word, something that's legitimate.

17 Q. And in connection with your written
18 rebuttal testimony, you did not do any analysis to
19 try to figure out what portion of the decline in
20 recording industry revenues between 2008 and 2013
21 is attributable to the availability of music on
22 YouTube or Vivo, right?

23 A. That's correct.

24 Q. And in connection with your written
25 rebuttal testimony, you didn't do any analysis to

1 try to figure out what portion of the decline in
2 recording industry revenues in the latter part of
3 the last decade is attributable to the great
4 recession, right?

5 A. That's correct.

6 Q. And Figure 2 in your written rebuttal
7 report reflects that, from 2010 to 2011, the number
8 of active users on Pandora increased by more than
9 50 percent without any discernible impact on
10 recording industry sales, right?

11 A. Certainly visually I don't think you
12 discern a difference in total digital and physical
13 sales between 2010 and 2011 --

14 Q. And Figure 3 --

15 A. I'm sorry -- on that chart.

16 Q. Sorry.

17 And Figure 3 reflects that, from 2010
18 to 2011, the number of total listening hours on
19 Pandora more than doubled without any discernible
20 impact on recording industry sales over the same
21 period, correct?

22 A. Right. Those two charts looks very
23 similar. The Pandora listener hours, not
24 surprisingly, track the number of active users very
25 closely.

1 Q. And Figure 5 in your written rebuttal
2 testimony reflects that, between 2004 and 2013,
3 industry sales revenues fell from over \$12 billion
4 to less than \$6 billion, while SoundExchange
5 distributions grew from essentially nothing to
6 nearly 600 million, correct?

7 A. That's correct.

8 Q. And you recall, do you not, that
9 industry sales revenues were more than \$20 billion
10 in 1999?

11 A. I don't remember precisely. I think,
12 when we talked about it at my deposition, we had
13 some issues that the two data sets might not have
14 been exactly the same. But it was -- it's bigger
15 than it was at the beginning of this chart.

16 Q. And certainly we talked about -- you
17 recall that, during your written direct testimony,
18 we talked about industry sales revenues over time.

19 A. It may have been then, too, yes.

20 Q. And you agree that the
21 multi-billion-dollar decline in industry revenues
22 between 1999 and 2004 was not accompanied by any
23 material revenues from streaming of any kind,
24 right?

25 A. So streaming revenues don't really kick

1 in until the mid part of the first decade of the
2 century. So prior to that, there's a decline that
3 is not related to streaming.

4 Q. And you would agree with me that a
5 claim that Pandora is net promotional to music
6 sales is consistent with a fact pattern in which
7 recorded music industry revenues did not fall as
8 sharply as they would have in the absence of
9 Pandora, correct?

10 A. Right. So if it's the case that
11 Pandora is, in fact, net promotional, that would
12 mean that the decline we seen would have been
13 steeper in that but-for world.

14 Q. I'd like to turn now to your discussion
15 of Dr. McBride's music sales experiments.

16 In your written rebuttal testimony, you
17 criticize Dr. McBride for not relying on data
18 related to the use of Pandora's buy button,
19 correct?

20 A. I don't remember exactly how I phrased
21 it, but I did talk about the fact that the evidence
22 from the buy button suggests that the sort of per
23 -- the per-stream purchases that are made from the
24 buy button, some of which are not even music
25 purchases -- it clicks through Amazon, and people

1 buy it much like a refrigerator or something. I
2 didn't know you could buy a refrigerator on
3 Amazon -- that if you look at those on a per-stream
4 basis, it's like one-sixth the magnitude of the
5 promotional effect that Dr. McBride testified, yes.

6 Q. And you agree with me that there's no
7 buy button for AM/FM radio, correct?

8 A. I agree there's no buy button for AM/FM
9 radio.

10 Q. And for the last 75 years, there has
11 not been a buy button for terrestrial radio, right?

12 A. I believe that is correct, yes.

13 Q. And at least at the artist and label
14 level, terrestrial radio has been widely understood
15 by the record industry to be promotional of sales,
16 right?

17 A. That's my understanding, yes.

18 Q. And there may be times, such as while
19 one is exercising or driving a car, when using the
20 buy button to purchase music in response to a spin
21 on Pandora or on the radio is impractical, right?

22 A. There may be times when it's
23 impractical. I don't know whether driving a car is
24 one if you just have to tap a button on the screen.
25 People do that all the time. But there may be

1 times where it's impractical. Sure.

2 Q. And you have not done any analysis to
3 quantity the extent to which people become familiar
4 with a song on Pandora and then decide at some
5 later point to go ahead and buy it, correct?

6 A. That's correct. The only -- the
7 analysis of the buy button is a determination that
8 it's sort of six times -- whether you call that an
9 order of magnitude or not, I'm not sure -- is
10 considerably -- in Dr. McBride's estimate, is
11 considerably bigger than what you would find even
12 if you attributed everything that happened to the
13 buy button as being a promotional impact and not
14 something that would have been bought otherwise.

15 And that to me is a little bit
16 surprising because that's the easiest way for it to
17 be promotional. I hear a song, I like it, and I
18 click the buy button, and I purchase it.

19 And if Dr. McBride's calculations are
20 right, despite that direct and easy way for the
21 promotion to happen, it's not -- it's predominantly
22 happening in other ways. And I think that's a
23 little inconsistent.

24 Q. But you haven't done any analysis to
25 figure out whether, in fact, it's predominantly

1 happening in other ways than what you have
2 described as what you think is the easiest way for
3 people to buy music that they hear on Pandora,
4 right?

5 A. Well, beyond the discussion that I was
6 having earlier that the Rosebud data suggests that
7 statutory services are not promotional, I didn't do
8 anything beyond that.

9 Q. And you've criticized Dr. McBride's
10 music sales experiments because you do not believe
11 that the geographic information about the location
12 of Pandora users and the location of their
13 purchases of recorded music is sufficiently
14 reliable; is that right?

15 A. So I would say that they -- we know
16 that there are issues with those data. And
17 Dr. McBride hasn't presented anything that suggests
18 that that's not a big issue.

19 And it's the fundamental underpinning
20 of the analysis he does. And he doesn't recognize
21 that these issues exist and doesn't address them in
22 any way. And unfortunately, I can't.

23 Q. One of the criticism that you've
24 leveled is that, for purchases made with a credit
25 card, the Nielsen SoundScan data on which

1 Dr. McBride relied uses the ZIP code of the billing
2 address of the credit card and not the ZIP code
3 where the buyer is physically located at the time
4 of sale, right?

5 A. That's my understanding of how that
6 Nielsen data works, yes.

7 Q. And that was one of the things that you
8 criticize expressly in your written rebuttal
9 testimony, Paragraph 33, right?

10 A. Well, I'd have to double check the
11 paragraph, but is it something that I said, yes.

12 Q. The geographic unit used in the music
13 sales experiments was not individual ZIP code,
14 right?

15 A. That's correct. I think it's done at
16 the DMA level.

17 Q. Correct.

18 And you understand that a
19 Nielsen-designated market area encompass an area
20 with multiple ZIP codes, right?

21 A. That's correct.

22 Q. And do you have an idea of how many ZIP
23 codes there are in the United States?

24 A. You know, I knew that at some point. I
25 don't know anymore. It's a big number.

1 Q. I'll represent to you it's more than
2 40,000.

3 A. I believe that.

4 Q. Okay. How many Nielsen DMAs and
5 subDMAs were there at the time of the music sales
6 experiments?

7 A. I think it was like 280-something.

8 Q. Well, it's about 230.

9 Does that sound right?

10 A. Yeah. I thought it was 280, but it
11 could be.

12 Q. Either way, it's fair to say that there
13 are lots and lots of ZIP codes in each -- that are
14 combined into a single DMA?

15 A. That's correct. I mean I think, just
16 to be fair -- and I don't know that it makes much
17 difference -- but I don't believe that every DMA
18 necessarily covers the whole country. I mean
19 there's some ZIP codes that are not in any DMA.

20 Q. Fair enough.

21 A. But yeah. I mean a DMA is bigger than
22 a ZIP code. But, of course, if your ZIP code is
23 Seattle, Washington, and you are -- you live in
24 Washington, D.C., those are very different -- I
25 mean it doesn't really change the problem.

1 Q. Let me try to keep it a little bit more
2 local for now. So -- just so we make sure that we
3 understand each other.

4 If you live in Friendship Heights, but
5 you buy a download from your office on Capitol
6 Hill, your billing ZIP code is going to be
7 different from the ZIP code of your physical
8 location at the time of purchase, but both ZIP
9 codes are in the Washington, D.C., designated
10 market area, right?

11 A. Sure.

12 Q. And if you look in Hagerstown,
13 Maryland, and you bought a CD at a store in
14 Georgetown, your billing ZIP code may be different
15 from the ZIP code of your physical location at the
16 time of purchase, but both ZIP codes are in the
17 Washington, D.C., DMA, right?

18 A. I don't actually know whether
19 Hagerstown is or not.

20 Q. I'll represent that it is.

21 A. Okay. Then taking that representation,
22 that would all be in the Washington, D.C., DMA,
23 yes.

24 Q. Okay. And you haven't done any
25 analysis to determine how frequently or

1 infrequently people purchase music outside of the
2 designated market area of their credit card billing
3 address, have you?

4 A. No, I haven't.

5 Q. And you haven't undertaken any analysis
6 to try to figure out whether correcting for any
7 errors in geographic information would cause the
8 promotional effects measured by Dr. McBride to
9 increase or decrease, correct?

10 A. I mean I can't do it, right? That's --
11 on the one hand, it involves Pandora data that I
12 certainly don't have access to. And Dr. McBride
13 didn't conduct the -- he didn't recognize these
14 problems. He didn't analyze these problems. He
15 didn't show that these problems are nothing to
16 worry about. He just ignored them able. And
17 they're real problems.

18 And I -- there's nothing I can do to
19 fix them. I would love to. I would have happily
20 done so. But I can't.

21 Q. And at your deposition, you told me
22 that Dr. McBride's in a much better position to do
23 that analysis than you are, right?

24 A. He would be, yes.

25 Q. And you don't to have a view, sitting

1 here today, one way or the other as to whether any
2 inaccuracies in the geographic data used by
3 Dr. McBride actually caused a bias upward in the
4 results or downward in the results that he
5 reported, right?

6 A. I mean, as I discussed before, this
7 problem can cause you to get the sign wrong, which
8 means he sees a positive effect. It could be that
9 there's actually a negative effect.

10 And we don't know -- as you've asked
11 and I've said a couple of times, we don't know how
12 big of a problem it is. We know that it's a
13 problem, but we don't have the information to know.

14 Now, to me, that makes the analysis
15 unreliable.

16 Q. And in addition to -- I believe you
17 just -- I believe you testified earlier that you
18 think he may be overstating the results of the
19 promotional effect, right?

20 A. I mean I think there's no promotional
21 effect. And he finds one. So I think he's
22 overstating that.

23 But I think what I -- what I said
24 before about this geographic issue is that you can
25 have the sign wrong. So you can just get the

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1 answer completely wrong because you have treatments
2 who are -- people you think are treatments who are
3 actually controls, and you have people who you
4 think are in the control group who are actually in
5 the treatment group.

6 Q. I understand that you think that it
7 may -- that he may be overstating it.

8 What I am asking you is whether or not
9 it's also possible that he's understating it.

10 You don't know one way or the other,
11 right?

12 A. Right. It's enough of a mess that I
13 don't know.

14 Q. I'd like to turn to your discussion in
15 your written rebuttal testimony about the impact of
16 piracy on record company negotiating positions.

17 A. Okay.

18 Q. And in this portion of your written
19 rebuttal testimony -- I just want to make sure
20 we're all clear -- you weren't making any
21 distinction between major record labels on the one
22 hand and independent record labels on the other
23 hand, right?

24 A. I think that's correct, yes.

25 Q. All right. Let me direct your

1 attention to what was previously marked as NAB
2 4198.

3 CHIEF JUDGE BARNETT: Mr. Marks, how
4 much more are you going to.

5 MR. MARKS:

6 MR. CHOUDHURY: Three minutes.

7 CHIEF JUDGE BARNETT: Okay.

8 BY MR. MARKS:

9 Q. Dr. Blackburn --

10 MR. CHOUDHURY: Do I get a copy?

11 MR. MARKS: Oh, I'm sorry. You do.

12 BY MR. MARKS:

13 Q. Dr. Blackburn, the document that's been
14 marked as NAB Exhibit 4198 is a copy of your
15 doctoral dissertation, correct?

16 A. It is.

17 Q. And your dissertation reflected your
18 analysis of the effect of piracy on the recorded
19 music industry, correct?

20 A. Correct. At the time of, you know,
21 sort of 2004 -- 2003, 2004 time period.

22 Q. And the dissertation is dated July
23 2005, right?

24 A. That's correct.

25 Q. And at the time you submitted this

1 dissertation in July of 2005, piracy in the form of
2 peer-to-peer file sharing had been a significant
3 force in the record industry for at least six
4 years; is that right?

5 A. That sounds about right.

6 Q. And you took this -- your dissertation
7 through a number of drafts prior to this version,
8 correct?

9 A. I believe so, yes.

10 Q. And your --

11 MR. CHOUDHURY: Your Honor, we would
12 object. This document was not on the disclosure
13 list for use with this witness.

14 MR. MARKS: I'm only using it for
15 impeachment purposes. I don't intend to use it in
16 evidence, Your Honor. It didn't need to be
17 disclosed. It's for impeachment only. And it
18 relates directly to his testimony in the section of
19 his written rebuttal testimony where he address
20 piracy.

21 CHIEF JUDGE BARNETT: Okay. Well,
22 let's get to that then --

23 MR. MARKS: All right.

24 CHIEF JUDGE BARNETT: -- and not worry
25 about how many drafts it took him to get there.

1 MR. MARKS: Fair enough. Okay.

2 BY MR. MARKS:

3 Q. You did say it accurately reflected
4 your views of the marketplace for recorded music at
5 the time, correct?

6 A. Right. 10 or 12 years ago, yes.

7 Q. And you concluded, as part of your
8 analysis, that the recorded music industry is one
9 which was extremely concentrated, correct?

10 A. I don't recall if it -- if it says it
11 there, you can point me to it, and I will refresh
12 my recollection. But I don't remember.

13 Q. I'm happy to point to you.

14 If you could turn to the page bearing
15 the Bates number SMDEX 112471 at the bottom.

16 A. I see it. And it says the recorded
17 music industry at this time is -- it doesn't say
18 "at this time," but this is in the 2002, 2003 time
19 period -- extremely concentrated both horizontally
20 and vertically.

21 Q. I'm sorry. In 2005 when you submitted
22 this report?

23 A. Well, I submitted the report in 2005.
24 But this is talking about the concentration in 2002
25 and 2003.

1 Q. And does that refresh your recollection
2 that you had concluded that the recorded music
3 industry at that time was one which was extremely
4 concentrated, correct?

5 A. Yes.

6 Q. With five companies owning virtually
7 all significant record labels, correct?

8 A. That's what it says, yes.

9 Q. And you determined that those five
10 companies had tremendous market power in the
11 distribution of albums, correct?

12 A. That's what it says on the next page,
13 yes.

14 Q. And those five companies have now
15 consolidated to just three major labels, right?

16 A. I think that's right.

17 MR. MARKS: No further questions.

18 MR. CHOUDHURY: Your Honor, we would
19 move -- there was nothing that was impeaching with
20 his testimony.

21 We would move to strike that whole
22 section of the testimony.

23 MR. MARKS: May I respond, Your Honor?

24 CHIEF JUDGE BARNETT: Yes.

25 MR. MARKS: The section of his written

1 rebuttal testimony talks about the effect of piracy
2 as a constraint on the negotiating positions of
3 record labels.

4 And I'm pointing out that, when his
5 analysis of the effect on piracy, he found that,
6 notwithstanding an even higher level of piracy, as
7 he explained, that the record labels nonetheless
8 had tremendous market power, and the industry was
9 extremely concentrated.

10 It's directly -- we think it's directly
11 inconsistent with his position that piracy is a
12 significant constraint on the market power of major
13 record labels.

14 CHIEF JUDGE BARNETT: Overruled.

15 MR. MARKS: No further questions, Your
16 Honor.

17 CHIEF JUDGE BARNETT: Okay. It's after
18 4:15. So we will be happy to welcome Dr. Blackburn
19 back tomorrow morning at 9:00.

20 (Whereupon, the proceeding was
21 adjourned at 4:15 p.m.)

22

23

24

25

1 CERTIFICATE OF COURT REPORTER

2

3 I, Bonnie L. Russo, do hereby certify that the
4 foregoing transcript is a true record of the
5 proceedings to the best of my ability, that I am
6 not related to or employed by any of the parties
7 involved in these proceedings, and, further, that I
8 am not a relative or employee of any attorney or
9 counsel employed by the parties hereto, or
10 financially interested in the proceedings.

11

12

Bonnie L. Russo

13

Notary Public

14

15 My Commission Expires:

16 May 16, 2016

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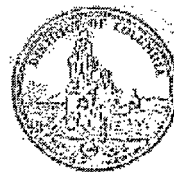
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